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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 78-139)

Special Tonnage Tax and Light Money—Customs Regulations amended

Foreign discriminating duties of tonnage and impost with respect to vessels of and certain imports from the Cayman Islands, the German Democratic Republic, and the United Arab Emirates suspended and discontinued; section 4.22 of the Customs Regulations, amended

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This rule adds the German Democratic Republic and the United Arab Emirates to the list of nations whose vessels are exempted from the payment of higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. It also extends the exemption previously afforded Great Britian to include the Cayman Islands. Satisfactory evidence has been obtained by the Department of State that no discriminating duties of tonnage or impost are imposed in ports of the German Democratic Republic, the United Arab Emirates, and the Cayman Islands upon vessels belonging to citizens of the United States or on their cargo.

EFFECTIVE DATE: The exemption became effective for the German Democratic Republic and the Cayman Islands, on January 1, 1977, and for the United Arab Emirates on October 25, 1975.

FOR FURTHER INFORMATION CONTACT:

Patrick J. Casey, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, known as "light money," on all foreign vessels which enter United States ports (46 U.S.C. 121, 128). However, vessels of foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of proof satisfactory to the President that no discriminatory duties of tonnage or imposts are imposed by that foreign nation on United States vessels or their cargo (46 U.S.C. 141). The President has delegated the authority to grant this exemption to the Secretary of the Treasury. Section 4.22 of the Customs Regulations (19 CFR 4.22) lists those nations whose vessels have been exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

On December 29, 1976, the Department of State advised the Department of the Treasury that satisfactory evidence has been obtained from the Government of Great Britain that no discriminating duties of tonnage or impost are imposed or levied in ports of the Cayman Islands upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported into the Cayman Islands in such vessels from the United States or from any foreign country.

On June 3, 1977, and October 26, 1977, the Department of State similarly advised that satisfactory evidence has been obtained from the Governments of the German Democratic Republic and the United Arab Emirates, respectively, that no discriminating duties of tonnage or impost are imposed or levied in ports of those countries upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported into those countries in those vessels.

In its communications, the Department of State advised no discriminating duties of tonnage or impost were imposed or levied upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise, imported into ports of the Cayman Islands and the German Democratic Republic from January 1, 1977, and into ports of the United Arab Emirates from October 25, 1975.

DECLARATION

Therefore, by virtue of the authority vested in the President by section 4228 of the Revised Statutes, as amended (46 U.S.C. 141), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951, as amended by Executive Order No. 10882, July 18, 1960 (3 CFR, 1959–1963 Comp., Ch. II), and pursuant to the authorization provided by Treasury Department Order No. 190, Rev. 15 (43 FR 11884), I declare that the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, in respect to vessels of the Cayman Islands, the German Democratic Republic, and the United Arab Emirates, and the produce, manufactures, or merchandise imported into the United States in such vessels from the Cayman Islands, the German Democratic Republic, and the United Arab Emirates, or from any other foreign country.

This suspension and discontinuance shall take effect from January 1, 1977, in respect to vessels of the Cayman Islands and the German Democratic Republic, and from October 25, 1975 in respect to vessels of the United Arab Emirates, and shall continue for so long as the reciprocal exemptions of vessels wholly belonging to citizens of the United States and their cargoes shall be continued and no longer.

AMENDMENT TO THE REGULATIONS

In accordance with this declaration, section 4.22 of the Customs Regulations (19 CFR 4.22) is amended by adding "(including the Cayman Islands)" after "Great Britain", and inserting "German Democratic Republic", and "United Arab Emirates" in the appropriate alphabetical sequence in the list of nations whose vessels are exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

(R.S. 251, as amended, 4219, as amended, 4225, as amended, 4228, as amended, sec. 3, 23 Stat. 119, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624, 46 U.S.C. 3, 121, 128, 141))

Because this amendment merely implements a statutory requirement, notice and public procedure thereon are found to be unnecessary and good cause exists for dispensing with the delayed effective date provisions of 5 U.S.C. 553.

DRAFTING INFORMATION

The principal author of this document was Todd J. Schneider, Regulations and Legal Publications Division, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices of the Customs Service and the Department of State partici-

pated in developing the document, both on matters of substance and style.

Dated May 16, 1978:

RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the FEDERAL REGISTER May 24, 1978 (43 FR 22173)]

(T.D. 78-140)

Drawback—Customs Regulations amended

Sections 22.20a, Customs Regulations, relating to the accelerated payment of drawback claims, amended

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 22—DRAWBACK

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: To obtain accelerated payment of a drawback claim, the claimant now must submit a bond with each claim, guaranteeing the refund of any excess payment made to him by Customs. This document amends the Customs Regulations to provide that, as an alternative, a claimant may attach a rider that assumes the additional liability for the refund of any excess accelerated drawback payment to a general term bond at the time the general term bond is filed.

EFFECTIVE DATE: June 23, 1978.

FOR FURTHER INFORMATION CONTACT:

Donald F. Beach, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-5856).

SUPPLEMENTARY INFORMATION:

BACKGROUND

"Drawback" denotes a situation in which a duty or tax, lawfully collected, is refunded or remitted, wholly or partially, because of a

particular use made of the merchandise on which the duty or tax was collected. One of the more common types of drawback is that allowed upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise (section 313(a), Tariff Act of 1930 (19 U.S.C. 1313(a)). Part 22 of the Customs Regulations (19 CFR Part 22) contains provisions regarding drawback claims.

Under section 22.20a of the Customs Regulations (19 CFR 22.20a), a drawback claimant may receive payment for his claim before it is liquidated. To obtain accelerated payment the claimant must file a bond on either Customs Form 7609 or 7611, guaranteeing the refund of any excess payment made to him by Customs, together with the request for accelerated payment.

Notice of a proposal to amend section 22.20a was published in the FEDERAL REGISTER on November 10, 1976 (41 FR 49646). The notice proposed an alternative to the procedure provided in section 22.20a for guaranteeing the refund of any excess payment made on a drawback claim. Under the alternative procedure, a bond rider (that is, a supplemental clause) stating that the principal and surety agree to assume the additional liability for the refund of any excess payment of accelerated drawback may be attached to the General Term Bond for Entry of Merchandise (Customs Form 7595) at the time the general term bond is filed. If this rider is attached to the general term bond, the amount of that bond would be increased to include the added coverage for drawback claims so that the overall amount of protection given Customs would not be reduced. The rider, with its alphabetical designation, is approved for use in the Customs Automated Bond Information System (ABIS). Several minor changes have been made to the sample rider published with the proposal. A sample rider, as revised, follows:

Rider to a General Term Bond for Accelerated Payment of Drawback Claims

P-ACCELERATED PAYMENT OF DRAWBACK CLAIMS—TO BE ADDED TO CUSTOMS FORM 7595

In addition to the conditions appearing in the bond dated _____, in the amount of _____, executed by _____, as principal, and by _____, as surety, to which this stipulation relates, it is hereby expressly agreed by the principal and surety thereon that the following additional condition shall apply:

And if the above-bounden principal, in consideration of the receipt of accelerated payment of drawback the amount of which is based upon the principal's own computations, shall, upon demand, refund

to the Customs Service the excess of the accelerated payment over the amount actually established to be due upon liquidation of the claim (it being understood and agreed that for purposes of this bond the amount due on a claim as determined by liquidation shall be binding on all parties to this obligation).

Witness our hand and seals this _____ day of ____ 19__

_____(Seal)
(Principal)

_____(Seal)
(Surety)

COMMENTS

Eight comments were received in response to the notice of proposed amendment, six of which supported the proposal.

One commenter suggested that Customs Automated Bond Information System (ABIS) be programmed to list separately the additional amount of the bond riders on the ABIS printout. This suggestion has been adopted.

One commenter stated that the proposal does not provide any way for the surety to limit its accelerated drawback liability to a specific dollar amount under the general term bond. This commenter urged that the bonds on Customs Forms 7609 and 7611 continue to be used to cover accelerated drawback liability in all cases.

As stated in the proposal, this method of securing bond coverage for accelerated payment of drawback claims is an alternative to the present procedure, which may continue to be used. If the new procedure is used, a rider stipulating that the principal and surety assume the additional liability for refund of excess accelerated drawback payments would be attached to the General Term Bond for Entry of Merchandise (Customs Form 7595) at the time the general term bond is filed. The amount of the general term bond would be increased to include the added coverage for drawback claims. The liability of the surety would be limited to the specific dollar amount of the general term bond plus the estimated amount of drawback to be claimed during the term of the bond.

AMENDMENT TO THE REGULATIONS

After consideration of all the comments received, it has been determined that the proposed amendment should be adopted without change, as set forth below.

DRAFTING INFORMATION

The principal author of this document was Paul G. Hegland, Regulations and Legal Publications Division, Office of Regulations

and Rulings, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in its development.

G. R. DICKERSON,
Acting Commissioner of Customs.

Approved May 11, 1978:
RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the FEDERAL REGISTER May 24, 1978 (43 FR 22175)]

PART 22—DRAWBACK

Section 22.20a. of the Customs Regulations (19 CFR 22.20a) is amended by adding the following between the second and third sentences therein:

§ 22.20a. Accelerated payment of drawback claims.

* * * In lieu of filing Customs Form 7609 or 7611, a claimant may provide appropriate coverage by executing and attaching an approved rider to a General Term Bond for Entry of Merchandise, Customs Form 7595, at the time of filing Customs Form 7595. When a rider is to be attached to Customs Form 7595, the amount of the bond shall be increased by the estimated amount of accelerated drawback to be claimed during the term of the bond. If actual accelerated drawback claims exceed the estimated amount of accelerated drawback, additional bond coverage shall be required. * * *

(R.S. 251, as amended, sections 313, 623, 624, 46 Stat. 693, as amended, 759, as amended (19 U.S.C. 66, 1313, 1623, 1624))

(T.D. 78-141)

Vessels in Foreign and Domestic Trades—Customs Regulations amended

Section 4.1(c), Customs Regulations, relating to persons boarding and leaving vessels without Customs permission, amended

DEPARTMENT OF THE TREASURY
OFFICE OF THE COMMISSIONER OF CUSTOMS
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADE

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final Rule.

SUMMARY: This document amends the Customs Regulations by defining the categories of individuals who may board or leave vessels arriving from outside the Customs territory of the United States without Customs permission before Customs formalities are completed and by clarifying the activities permitted to be performed by these individuals while on board.

EFFECTIVE DATE: June 23, 1978.

FOR FURTHER INFORMATION CONTACT:

Donald H. Reusch, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4.1(c) of the Customs Regulations (19 CFR 4.1(c)) provides that with certain exceptions, no person shall board or leave a vessel arriving from outside the Customs territory of the United States without the permission of a Customs officer before the vessel has been taken in charge by Customs. The exceptions include a pilot, officer of Customs or the Coast Guard, immigration officer, health officer, agent of the vessel, or consular officer.

It had been brought to the attention of the Customs Service that some vessel agents who board a vessel before Customs formalities are completed may solicit business from the master or purchasing officer for the vessel's stores, in addition to attending to Customs formalities. As a result, it was contended, other suppliers, who cannot board the vessel until after Customs formalities are completed, are placed at a competitive disadvantage because the vessel agents on board have already solicited the business.

After determining that the claim had merit, on May 7, 1975, the Customs Service published a notice of proposed rulemaking in the FEDERAL REGISTER (40 FR 19830) to amend section 4.1(c) to clarify and limit the activities to be performed by the individuals who may board or leave a vessel without Customs permission before Customs formalities are completed. The notice emphasized that these indi-

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viduals are authorized to board without Customs permission solely to aid in the navigation of the vessel or to aid in or perform Customs or certain other Government business, and not to conduct commercial or private business while on board.

Interested persons were given until June 6, 1975, to submit relevant data, views, or arguments. After consideration of the comments received, the Customs Service has decided to make the changes set forth in the document.

DISCUSSION OF COMMENTS

Although the proposal included a specific exception for a "pilot in connection with the navigation of a vessel," one commenter suggests that a similar provision was needed to permit a person who is not a pilot to board an unmanned barge without Customs permission to assist in its navigation. Inasmuch as this comment has merit, the proposed amendment has been revised to include the suggestion.

Another commenter supports the proposal provided container handling begins as soon as possible after the vessel arrives and the Customs officer reviews the ship's papers. By further defining the categories of individuals who may board the vessel without Customs permission, the proposed amendment will aid the Customs officer to attend to his duties, thereby ensuring prompt commencement of cargo handling.

The Animal and Plant Health Inspection Service of the U.S. Department of Agriculture suggests that its inspectors be specifically included within the category of Government officers authorized to board and leave a vessel without Customs permission to perform its Government business. The suggestion has been adopted and the proposed amendment revised accordingly.

DISCUSSION OF OTHER CHANGES

It is intended that the excepted categories of individuals may both board and leave a vessel without Customs permission. However, as proposed, the second sentence of the amendment is unclear in that it may be interpreted to provide that except for the purpose of reporting the arrival of the vessel, no person, including the excepted categories of individuals, may leave the vessel without Customs permission before Customs formalities are completed. Therefore, the language of the proposed amendment has been revised to make it clear that the excepted categories of individuals may both board and leave a vessel without Customs permission.

The proposed amendment, modified to include these changes, is adopted as set forth below.

DRAFTING INFORMATION

The principal author of this document was Charles D. Ressin, Regulations and Legal Publications Division, Office of Regulations

and Rulings, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in developing the document both on matters of substance and style.

AMENDMENT TO THE REGULATIONS

Paragraph (c) of section 4.1 of the Customs Regulations (19 CFR 4.1(c)) is amended to read as follows:

§ 4.1 Boarding of vessels; cutter and dock passes.

* * * * * *

(c)(1) No person, with or without the consent of the master, except a pilot in connection with the navigation of the vessel, personnel from another vessel in connection with the navigation of an unmanned barge, an officer of Customs or the Coast Guard, an immigration or health officer, an inspector of the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture, or an agent of the vessel or consular officer exclusively for purposes relating to Customs formalities, shall go on board any vessel arriving from outside the Customs territory of the United States without permission of the district director or the Customs officer in charge until the vessel has been taken in charge by a Customs officer.

(2) A person may leave the vessel for the purpose of reporting its arrival as required by law (see section 4.2), but no other person, except those designated in paragraph (c)(1) of this section, shall leave any vessel arriving from outside the Customs territory of the United States, with or without the consent of the master, without the permission of the district director of Customs or the Customs officer in charge until the vessel has been properly inspected by Customs and brought into the dock or anchorage at which cargo is is to be unladen and until all passengers have been landed from the vessel.[2]

(3) Every person permitted to go on board or to leave without the consent of a Customs officer under the provisions of this paragraph shall be subject to Customs and quarantine regulations.

(4) The master of any vessel shall not authorize the boarding or leaving of his vessel by any person in violation of this paragraph.

(R.S. 251, as amended, sections 1–3, 31 Stat. 58, section 624, 46 Stat. 759 (19 U.S.C. 66, 1624, 46 U.S.C. 163))

G. R. DICKERSON,
Acting Commissioner of Customs.

Approved: May 11, 1978
RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the FEDERAL REGISTER May 24, 1978 (43 FR 22174)]

(T.D. 78-142)

Bonds

Approval and discontinuance of bonds on Customs Form 7587 for the control of instruments of international traffic of a kind specified in section 10.41a of the Customs Regulations

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 19, 1978

Bonds on Customs Form 7587 for the control of instruments of international traffic of a kind specified in section 10.41a of the Customs Regulations have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of list.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Amoco Chemicals Corp., 200 East Randolph Drive, Chicago, IL; Seaboard Surety Co.	Aug. 1, 1977	Nov. 4, 1977	Mobile, AL; $10,000
Amoco Chemicals Corp., 200 East Randolph Drive, Chicago, IL; Seaboard Surety Co. D 11/4/77	Nov. 24, 1976	Dec. 10, 1976	New Orleans, LA; $10,000
Cargo-Ships & Containers Agency Ltd., 618 Second Ave., Seattle WA; Washington International Ins. Co.	Jan. 4, 1978	Jan. 4, 1978	Seattle, WA; $10,000
Coflexip and Services, Inc., 4242 Southwest Freeway, Houston, TX; St. Paul Fire & Marine Ins. Co.	Feb. 15, 1978	Mar. 2, 1978	New Orleans, LA; $10,000
Gulf Caribbean Marine Lines, Inc. (AWA Corp.), 260 North Belt East, Houston, TX; The American Ins. Co.	Feb. 8, 1978	Mar. 9, 1978	Port Arthur, TX; $10,000
Intsel Corp., 825 3rd Avenue, New York, NY; St. Paul Fire & Marine Ins. Co.	Mar. 27, 1978	Mar. 31, 1978	New York Seaport; $10,000
Jack B. Kelly Inc., 66 West Kelly Drive, Amarillo, TX; Peerless Ins. Co.	Mar. 15, 1978	Mar. 15, 1978	New York Seaport; $10,000
Robert E. Landweer & Co., Inc., 905 Western Ave., Seattle, WA; Washington International Ins. Co.	May 5, 1977	May 9, 1977	Seattle, WA; $10,000

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Maxi-Marine Maritime Services, Inc., 1314 Texas Ave., Houston, TX; St. Paul Fire and Marine Ins. Co.	Jan. 26, 1978	Mar. 2, 1978	New Orleans, LA; $10,000
Morflot America Shipping Inc., 67 Walnut Ave., Clark, NJ; Sentry Insurance (PB 7/31/76) D 3/7/78	Oct. 13, 1976	Nov. 2, 1976	San Francisco, CA; $10,000
National Pressed Glass Limited, 47 Morton Avenue East, Brantford, Ontario, Canada; The Home Insurance Company.	April 26, 1976	Oct. 26, 1976	Buffalo, NY; $10,000
North American Maritime Agencies, 100 California St., Suite 1060, San Francisco, CA; Peerless Insurance Co. D 11/14/77	Oct. 30, 1974	Oct. 21, 1974	San Francisco, CA; $10,000
Oceans International Corp., 1314 Texas Ave., Houston, TX; St. Paul Fire and Marine Ins. Co.	Jan. 26, 1978	Mar. 2, 1978	New Orleans, LA; $10,000
Owens-Illinois, Inc., P.O. Box 1035, Toledo, OH; U.S. Fidelity & Guaranty Co. D 9/27/77	Sept. 16, 1976	Sept. 16, 1976	Tampa, FL; $10,000
Pacific Customs Brokerage Co., 115-12th Street, Detroit, MI; Transamerica Ins. Co. D 2/16/78	Jan. 29, 1964	Jan. 31, 1964	Detroit, MI; $10,000
Patterson Wylde & Co., Inc., 156 State St., Boston, MA; Peerless Ins. Co. D 3/6/78	April 1, 1970	April 1, 1970	Boston, MA; $10,000
William J. Rountree Co., Inc., 17 Battery Place, New York, NY; St. Paul Fire & Marine Ins. Co. D 12/29/64	Jan. 1, 1964	Jan. 6, 1964	New York, NY; $10,000
Geraldine L. Schmitt d/b/a Gerry Schmitt & Co., 28111 Hoover Rd., Suite 5A & 6A, Warren, MI; St. Paul Fire & Marine Ins. Co. (PB 2/20/73) D 1/19/78	April 5, 1978	April 5, 1978	Detroit, MI; $10,000
Scott Environmental Technology Inc., Route 611, Plumsteadville, PA; St. Paul Fire and Marine Ins. Co.	Jan. 17, 1978	Feb. 24, 1978	Philadelphia, PA; $10,000
Shaw Savill & Albion Co., Ltd., 14/19 Leadenhall St., London, England; Fidelity & Deposit Company of MD. D 2/23/78	Dec. 6, 1976	Jan. 11, 1977	New Orleans, LA; $10,000

(BON-3-10)

LEONARD LEHMAN
Assistant Commissioner
Regulations and Rulings

(T.D. 78-143)

Antidumping—Impression Fabric of Man-Made Fiber from Japan

The Secretary of the Treasury makes public a finding of dumping with respect to to impression fabric of man-made fiber from Japan. Section 153.46, Customs Regulations, amended

DEPARTMENT OF THE TREASURY,
Washington, D.C.

TITLE—CUSTOMS DUTIES

CHAPTER I—UNITED STATES CUSTOMS SERVICE

PART 153—ANTIDUMPING

AGENCY: United States Customs Service, Treasury Department

ACTION: Finding of Dumping

SUMMARY: This notice is to advise the public that separate antidumping investigations conducted by the U.S. Treasury Department and the U.S. International Trade Commission have resulted in determinations that impression fabric of man-made fiber from Japan, with the exception of that produced and sold by two producers, is being sold at less than fair value and that these sales are likely to injure an industry in the United States. On this basis, a finding of dumping is being issued and, generally, all unappraised entries of this merchandise, with the exception of that produced and sold by two producers, will be liable for the possible assessment of special dumping duties.

EFFECTIVE DATE: May 25, 1978.

FOR FURTHER INFORMATION CONTACT:

David R. Chapman, Technical Branch, Duty Assessment Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229, (202-566-5492).

SUPPLEMENTARY INFORMATION:

Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)) (referred to in this notice as "the Act"), gives the Secretary of the Treasury responsibility for making a determination of sales at less than fair value. Pursuant to this authority the Secretary has determined that impression fabric of man-made fiber, finished, whether slit or uncut, and not inked (hereinafter, "impression fabric of man-made fiber") from Japan, other than that produced and sold for export by Asahi Chemical Industry Co., Ltd., (Asahi) and the Shirasaki Tape Co., Ltd. (Shirasaki), is being, or is likely to be, sold

at less than fair value within the meaning of section 201(a) of the Act (19 U.S.C. 160(a)). (Published in the FEDERAL REGISTER of December 30, 1977 (42 FR 65344–45)).

Section 201(a) of the Act (19 U.S.C. 160(a)) gives the United States International Trade Commission responsibility for determination of injury or likelihood of injury. The Commission has determined, and on March 28, 1978, it notified the Secretary of the Treasury, that an industry in the United States is likely to be injured by reason of the importation of impression fabric, of man-made fiber from Japan, except that produced and sold for export to the United States by Asahi and Shirasaki, that is being, or is likely to be, sold at less than fair value within the meaning of the Act. (Published in the FEDERAL REGISTER of April 4, 1978 (43 FR 14143)).

Section 153,46 of the Customs Regulations (19 CFR 153.46) is amended by adding the following to the list of findings of dumping currently in effect:

Commodity	*Country*	T.D.
Impression fabric of man-made fiber, finished, whether slit or uncut, and not inked, except that produced and sold by Asahi Chemical Industry Co., Ltd., and the Shirasaki Tape Co., Ltd.	Japan	78–143

(Secs. 201, 407, 42 Stat. 11, as amended, 18; 19 U.S.C. 160, 173).

Date May 19, 1978:

ROBERT H. MUNDHEIM.
General Counsel of the Treasury.

[Published in the FEDERAL REGISTER May 25, 1978 (43 FR 22344)]

(T.D. 78–144)

Bonds

Approval and discontinuance of Carrier bonds, Customs Form 3587

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 19, 1978

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow.

"PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of list.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Affiliated Transport Services Inc., 90 Kellogg St., Jersey City, NJ; motor carrier; Peerless Ins. Co.	Feb. 9, 1978	Feb. 9, 1978	Newark, NJ; $50,000
All Southern Trucking, Inc., P.O. Box 2698, Tampa, FL; motor carrier; American Manufacturers Mutual (PB 2/3/76) D 3/6/78 [1]	Feb. 1, 1978	Mar. 6, 1978	Tampa, FL; $25,000
Atkinson Freight Lines, Inc., Blanche Road, Cornwells Hgts, PA; motor carrier; American Employers' Ins. Co. D 6/19/78	July 16, 1975	Aug. 14, 1975	Philadelphia, PA; $50,000
B-Line Express Ltd., 3839 Odgen Rd., Calgary, Alberta, Canada; motor carrier; St. Paul Fire & Marine Ins. Co. D 10/31/77	Sept. 24, 1976	Jan. 12, 1977	Seattle, WA; $25,000
Badger Freightways, Inc., 2720 North 19th St., Sheboygan, WI; motor carrier; Fidelity and Deposit Company of MD (PB 4/21/77) D 4/21/78 [2]	Apr. 21, 1978	May 2, 1978	Milwaukee, WI; $25,000
Dan Barclay Inc., 362 Main St., P.O. Box 426, Lincoln Park, NJ; motor carrier; American Motorist Insurance Co.	Mar. 2, 1978	Mar. 15, 1978	Newark, NJ; $50,000
Benton Brothers Film Express, Inc., 168 Baker Street, N.W., Atlanta, GA; motor carrier; Transamerica Insurance Co.	Oct. 1, 1977	Apr. 4, 1978	Savannah, GA; $25,000
Cast North America Ltd., One Westmount Square, Montreal, P.Q., Canada; motor carrier; Transamerica Ins. Co. (PB 2/23/76) D 3/13/78	Oct. 25, 1977	Mar. 13, 1978	Ogdensburg, NY; $50,000
Chem Haulers, Inc., 118 E. Mobile St., P.O. Box 330, Florence, AL; motor carrier; Insurance Company of North America	Apr. 12, 1977	Mar. 28, 1978	Mobile, AL; $50,000
Chotin Transportation, Inc., 1414 One Shell Square, New Orleans, LA; water carrier; Safeco Insurance Co. (PB 2/28/72) D 3/13/78 [3]	Feb. 28, 1978	Mar. 13, 1978	New Orleans, LA; $50,000
Christman Trucking Corp., Washington, PA; motor carrier; America States Insurance Co.	Feb. 9, 1978	Feb. 23, 1978	Philadelphia, PA; $25,000

See footnotes at end of table.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Claxon Truck Lines, Inc., 453 Versailles Rd., Frankfort, KY; motor carrier; The Ohio Casualty Ins. Co. D 3/28/78	Oct. 24, 1975	Nov. 13, 1975	Cleveland, OH; $50,000
Coastal Towing Corp., 1826 Bank of the Southwest Bldg., Houston, TX; water carrier; Federal Ins. Co. D 3/15/78	Mar. 12, 1978	Aug. 22, 1973	Houston, TX; $50,000
Colonial Motor Freight Line, Inc., P.O. Box 7027, High Point, NC; motor carrier; Liberty Mutual Ins. Co. (PB 12/6/73) D 3/21/78 [4]	Jan. 10, 1978	Mar. 22, 1978	Wilmington, NC; $25,000
Mike Conrotto Trucking, 6490 Chestnut St., P.O. Box 638, Gilroy, CA; motor carrier; Peerless Ins. Co.	Mar. 8, 1978	Mar. 13, 1978	San Francisco, CA; $50,000
Consolidated Truck Service, 1 Scout Ave., So. Kearny, NJ; Motor Carrier; The Continental Ins. Co.	Mar. 29, 1978	Apr. 18, 1978	Newark, NJ; $50,000
Crescent Trucking, Inc., 600 Governors Dr., Winthrop, MA; motor carrier; The Aetna Casualty & Surety Co.	Feb. 21, 1978	Mar. 1, 1978	Boston, MA; $25,000
Noel E. Tidwell, d/b/a Cullman Banna Supply, 104 First Avenue East, Cullman, AL; motor carrier; St. Paul Fire & Marine Ins. Co. D 3/28/78	Feb. 28, 1977	Feb. 28, 1977	Mobile, AL $25,000
Delaware Ship Supply Co., Inc., 1820 S. 4th Street, Philadelphia, PA; motor carrier; Aetna Ins. Co.	Mar. 10, 1978	Apr. 20, 1978	Philadelphia, PA; $25,000
Dorn's Transportation, Inc., Railroad Ave., Ext. (Colonie) Albany, NY; motor carrier; American Druggists Ins. Co. D 3/3/78	July 27, 1976	Sept. 8, 1976	New York Seaport; $25,000
Feuer Transportation, Inc., Federal-Knowles Sts., Yonkers, NY; motor carrier; Hartford Accident & Indemnity Co. D 3/3/78	Jan. 26, 1955	Feb. 15, 1955	New York Seaport; $25,000
Flite Line Service Inc., International Airport, Philadelphia, PA; motor carrier; The Ohio Casualty Co. D 5/5/78	Dec. 17, 1969	Dec. 19, 1969	Philadelphia, PA; $25,000
L. D. Fontaine Trucking, 504 Riverview Blvd., Great Falls, MT; motor carrier; Hallmark Ins. Co. D 4/4/77	Mar. 15, 1975	Apr. 4, 1975	Great Falls, MT; $25,000

See footnotes at end of table.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Frank's Trucking Corp., 1705 South Clark St., Chicago, IL; motor carrier; St. Paul Fire & Marine Ins. Co. D 2/27/78	Feb. 1, 1976	Feb. 10, 1976	Chicago, IL; $30,000
Gay Trucking Company, P.O. Box 7179, Savannah, GA; motor carrier; Liberty Mutual Ins. Co.	Dec. 21, 1977	Feb. 3, 1978	Savannah, GA; $25,000
Gulf Caribbean Marine Lines, Inc., 260 North Belt East, Houston, TX; water carrier; Fireman's Fund Ins. Co.	Feb. 17, 1978	Mar. 31, 1978	San Francisco, CA; $50,000
Hall's Motor Transit Co., 6060 Carlisle Pike, Mechanicsburg, PA; motor carrier; Federal Ins. Co. D 6/19/78	June 18, 1956	Aug. 17, 1956	Philadelphia, PA; $25,000
Indiana Refrigerator Lines, Inc., P.O. Box 552, Riggin Road, Muncie, IN; motor carrier; American Druggists' Ins. Co.	Nov. 17, 1977	Nov. 30, 1977	Cleveland, OH; $50,000
L & M Produce & Truck Lines Limited, 51 Laverne Ave., Downsview, Ontario, Canada; motor carrier; The Continental Ins. Co.	Dec. 8, 1977	Mar. 6, 1978	Buffalo, NY; $25,000
Law Trucking Co., Crow Point Road, Lincoln, RI; motor carrier; The Aetna Casualty and Surety Co.	Feb. 24, 1978	Mar. 8, 1978	Providence, RI; $25,000
Leonard Bros. Rigging & Trucking Co., Inc. P.O. Box 520602, 2515 N.W. 20th St., Miami, FL; motor carrier; Fidelity & Deposit Company of Maryland	Dec. 31, 1977	Jan. 5, 1978	Miami, FL; $25,000
Lewis Truck Lines, Inc., Rt. 6, Box 65A, Conway, SC; motor carrier; United States Fire Ins. Co.	Jan. 12, 1978	Mar. 8, 1978	Charleston, SC; $25,000
B. J. McAdams, Inc., 1937 Lennell Drive, Little Rock, AR; motor carrier; National Bonding & Accident Ins. Co. (PB 11/21/69) D 3/16/78 [5]	Nov. 21, 1977	Apr. 5, 1978	New Orleans, LA; $25,000
Maislin Transport of Delaware, Inc., 530 Totem Road, Bensalem Township, PA; motor carrier; Globe Indemnity Co. (PB 1/9/76) D 3/1/78	Jan. 31, 1978	Mar. 2, 1978	Philadelphia, PA; $150,000
Marine Transport, Inc., P.O. Box 9628, Norfolk, VA; motor carrier; Fidelity & Deposit Co. of Maryland	Mar. 1, 1978	Mar. 23, 1978	Norfolk, VA; $25,000
Mawson & Mawson, Inc., P.O. Box 248; Langhorne, PA; motor carrier; Aetna Casualty & Surety Co. (PB 4/8/71) D 4/9/78 [6]	Apr. 8, 1978	Apr. 14, 1978	Philadelphia, PA; $25,000

See footnotes at end of table.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Merry Shipping Company, Inc., P.O. Box 1928, Savannah, GA; water carrier; Peerless Ins. Co. (PB 1/1/75) D 1/19/77 [7]	Jan. 19, 1977	Jan. 19, 1977	Savannah, GA; $50,000
Metroflight, Inc., d/b/a Metro Airlines and d/b/a Metroflight Airlines, P.O. Box 58608, Houston, TX; motor carrier; National Surety Corp. (PB 10/9/75) D 3/27/78 [8]	Nov. 22, 1977	Mar. 27, 1978	Houston, TX; $25,000
Mid Continent Freight Lines, Inc., 11 Oak Street, S.E., Minneapolis, MN; motor carrier; Fireman's Fund Ins. Co. D 3/24/78	July 2, 1964	July 28, 1964	Minneapolis, MN; $25,000
Morrison Motor Freight, Inc., 1100 East Jenkins Boulevard, Akron, OH; motor carrier; Fireman's Fund Ins. Co. D 4/28/78	July 1, 1976	July 2, 1976	Cleveland, OH; $50,000
Nu-Car Carriers, Inc., 950 Haverford Road, Bryn Mawr, PA; motor carrier; Liberty Mutual Ins. Co.	Feb. 3, 1978	Feb. 20, 1978	Philadelphia, PA; $25,000
O. K. Motor Service, Inc., 5400 S. Center, Summit, IL; motor carrier, National Surety Corp. (PB 3/21/73) D 4/21/78 [9]	Mar. 21, 1978	Apr. 21, 1978	Chicago, IL; $35,000
Packet Motor Express, Inc., 465 Meeting St., Charleston, SC; motor carrier; Liberty Mutual Ins. Co. (PB 12/22/71) D 4/21/78 [10]	Apr. 7, 1978	Apr. 21, 1978	Charleston, SC; $25,000
Quirion Transport Inc., 4516 Laval Street, Megantic, Quebec, Canada; motor carrier; Peerless Ins. Co. (PB 2/23/76) D 2/15/78 [11]	Feb. 23, 1978	Feb. 15, 1978	Portland, ME; $25,000
Rogers Motor Express, 235 Bunker Ave., Modesto, CA; motor carrier; St. Paul Fire & Marine Ins. Co. D 3/6/78	Sept. 10, 1974	Sept. 23, 1974	San Francisco, CA; $25,000
Aaron Smith Trucking Co. Inc., P.O. Box 153, Dudley, NC; motor carrier; Federal Ins. Co. D 4/21/78	Feb. 11, 1972	Feb. 18, 1972	Wilmington, NC; $25,000
Southern Freightways, Inc., P.O. Box 374, Eustis, FL; motor carrier; Aetna Ins. Co.	Feb. 15, 1978	Mar. 15, 1978	Tampa, FL; $25,000
Southern Tank Lines, Inc., 4107 Bells Lane, Louisville, KY; motor carrier; Fidelity & Deposit Co. of Maryland D 5/1/78	May 26, 1969	June 10, 1969	Cleveland, OH; $75,000
Springmeier Shipping Co., 1123 Hadley Street, St. Louis, MO; freight forwarder; Trans america Ins. Co. (PB 8/9/72) D 3/21/78 [12]	Feb. 21, 1978	Mar. 21, 1978	St. Louis, MO; $50,000

See footnotes at end of table.

Name of principal and surety	Date of Bond	Date of Approval	Filed with district director/area director/amount
Strickland Transportation Co., Inc., P.O. Box 5689, Dallas, TX; motor carrier, Federal Ins. Co. D 3/6/78	Apr. 1, 1968	Apr. 1, 1968	Houston, TX; $25,000
Super Motor Lines, Inc., 1800 E. Bessemer Ave., P.O. Box 6553, Greensboro, NC; motor carrier; United States Fire Insurance Co.	Feb. 22, 1978	Apr. 7, 1978	Wilmington, NC; $50,000
Suwannee Transfer, Inc., 2627 Buckman Street, Jacksonville, FL; motor carrier; St. Paul Fire & Marine Ins. Co.	Nov. 9, 1977	Mar. 8, 1978	Tampa, FL; $25,000
Trans-American Van Service, Inc., 12301 W. Freeway, Fort Worth, TX; motor carrier; Mid-Century Ins. Co. (PB 11/10/75) D 3/23/78 [13]	Nov. 18, 1977	Mar. 23, 1978	Houston, TX; $25,000
Trans-American World Transit, Inc., 12301 West Freeway, Ft. Worth, TX; motor carrier; Mid-Century Ins. Co. (PB 11/10/75) D 3/23/78 [14]	Nov. 18, 1977	Mar. 23, 1978	Houston, TX; $25,000
Transconex, Inc., 3000 N.W. 74th Ave., Miami, FL; motor carrier; national Bonding & Accident Ins. Co. of NY D 1/29/78	Oct. 5, 1977	Oct. 5, 1977	Miami, FL; $50,000
Triangle Express, Ltd., 5051 Still Creek Road, Burnaby, B.C., Canada; motor carriers; Safeco Ins. Co. of America	July 18, 1977	Mar. 30, 1978	Seattle, WA; $25,000
Vest Transportation Co., Inc., P.O. Box 1355, Greenville, MS; motor carrier; St. Paul Fire & Marine Ins. Co. D 2/26/75	May 8, 1973	May 21, 1973	New Orleans, LA; $50,000
V. C. Produce Express Ltd., 3160 Norland Ave., Burnaby, B.C., Canada; motor carrier; St. Paul Fire & Marine Ins. Co. D 11/6/77	July 18, 1975	Oct. 6, 1975	Seattle, WA; $25,000
Virginia-Carolina Freight Lines, Inc., P.O. Box 4988, Martinsville, VA; motor carrier; Utica Mutual Ins. Co.	Feb. 14, 1978	Mar. 24, 1978	Norfolk, VA; $25,000
Wholesale Delivery Service (1972) Ltd., 2810 Norland Ave., Burnaby, B.C., Canada; motor carrier; The Continental Ins. Co.	Nov. 8, 1977	Feb. 24, 1978	Seattle, WA; $25,000
Wolverine Express, Inc., c/o McLean Trucking Co., 617 Waughtown St., Winston-Salem, NC; motor carrier; Fidelity and Deposit Company of MD (PB 4/3/68) D 4/3/78 [15]	Apr. 3, 1978	Apr. 3, 1978	Chicago, IL; $25,000
Wooleyhan Transport Co., City Line & S. Heald Street, Wilmington, DE; motor carrier; Fireman's Fund Ins. Co. (PB 4/21/61) D 4/20/78 [16]	Mar. 22, 1978	Apr. 21, 1978	Philadelphia, PA $30,000

[1] Surety is Continental Casualty Co.
[2] Surety is St. Paul Fire & Marine Ins. Co.
[3] Surety is Federal Ins. Co.
[4] Surety is U.S. Fidelity & Graranty Co.
[5] Surety is St. Paul Fire & Marine Ins. Co.
[6] Surety is St. Paul Fire & Marine Ins. Co.
[7] Surety is U.S. Fidelity & Graranty Co.
[8] Surety is U.S. Fire Ins. Co.
[9] Surety is Peerless Ins. Co.
[10] Surety is National Surety Corp.
[11] Surety is Transamerica Ins. Co.
[12] Surety is The Hanover Ins. Co.
[13] Surety is Great American Ins. Co.
[14] Surety is Great American Ins. Co.
[15] Surety is Hartford Accident & Indemnity Co.
[16] Surety is Federal Ins. Co.

(BON-3-03)

LEONARD LEHMAN
Assistant Commissioner
Regulations and Rulings.

(T.D. 78-145)

Bonds

Discontinuance of consolidated aircraft bond (air carrier blanket bond), Customs Form 7605

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 19, 1978

The following consolidated aircraft bond has been discontinued as shown below. The symbol "D" indicates that the bond has been discontinued on the month, day, and year represented by the figures which follow.

Name of principal and surety	Date term Commences	Date of Approval	Filed with area director of Customs; amount
Hi-Air, Inc., 2451 Democrat Road, Memphis, TN; Fidelity and Deposit Company of Maryland D 5/10/78	Jan. 1, 1970	Feb. 26, 1970	New Orleans, LA; $100,000

(BON-3-01)

LEONARD LEHMAN
Assistant Commissioner
Regulations and Rulings

265-773—78——3

(T.D. 78-146)

Foreign Currencies—Daily Rates for Countries Not On Quarterly List

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar, Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 5, 1978.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:	
April 24, 1978	$0.2152
April 25, 1978	.2154
April 26, 1978	.2155
April 27, 1978	.2158
April 28, 1978	.2159
Iran rial:	
April 24, 1978	$0.0141
April 25, 1978	.0141
April 26, 1978	.0141
April 27, 1978	.0141
April 28, 1978	.0140
People's Republic of China yuan:	
April 24, 1978	$0.5811
April 25, 1978	.5811
April 26, 1978	.5811
April 27, 1978	.5811
April 28, 1978	.5822
Philippines peso:	
April 24–28, 1978	$0.1355

Singapore dollar:

April 24, 1978	$0.4238
April 25, 1978	.4255
April 26, 1978	.4262
April 27, 1978	.4274
April 28, 1978	.4287

Thailand baht (Tical):

April 24–28, 1978	$0.4090

(LIQ-3)

WILLIAM D. SLYNE
for JOHN B. O'LOUGHLIN
Director,
Duty Assessment Division.

(T.D. 78-147)

Foreign Currencies—Certification Of Rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 5, 1978.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 78-129 for the following country. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Switzerland franc:

April 24, 1978	$0.5110
April 25, 1978	.5107
April 26, 1978	.5095

(LIQ-3)

WILLIAM D. SLYNE
for JOHN B. O'LOUGHLIN
Director,
Duty Assessment Division.

(T.D. 78-148)

Foreign Currencies—Daily Rates for Countries Not On Quarterly List

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Hong Kong dollar, Iran rial, People's Republic of China yuan, Philippines peso, Singapore dollar Thailand baht (tical)

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 11, 1978.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates in U.S. dollars for the dates and foreign currencies shown below. These rates of exchange are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Hong Kong dollar:	
May 1, 1978	$0.2159
May 2, 1978	.2156
May 3, 1978	.2156
May 4, 1978	.2155
May 5, 1978	.2156
Iran rial:	
May 1–5, 1978	$0.0140
People's Republic of China yuan:	
May 1, 1978	$0.5822
May 2, 1978	.5822
May 3, 1978	.5793
May 4, 1978	.5793
May 5, 1978	.5793
Philippines peso:	
May 1, 1978	$0.1355
May 2, 1978	.1355
May 3, 1978	.1355
May 4, 1978	.1355
May 5, 1978	.1365
Singapore dollar:	
May 1, 1978	$0.4287
May 2, 1978	.4284
May 3, 1978	.4283
May 4, 1978	.4292
May 5, 1978	.4298

Thailand baht (tical):
May 1–5, 1978 ..... $0.0490

(LIQ-3)

JOHN B. O'LOUGHLIN
Director,
Duty Assessment Division.

(T.D. 78-149)

Foreign Currencies—Certification of Rates

Rates of exchange certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., May 11, 1978.

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified the following rates of exchange which varied by 5 per centum or more from the quarterly rate published in Treasury Decision 78-129 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Portugal escudo:
May 5, 1978 ..... $0.0222¼

Switzerland franc:
May 2, 1978 ..... $0.5086
May 3, 1978 ..... .5095
May 4, 1978 ..... *
May 5, 1978 ..... .5128

(LIQ-3)

JOHN B. O'LOUGHLIN,
Director,
Duty Assessment Division.

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* Rate did not vary—use quarterly rate.

(T.D. 78-150)

Antidumping—Carbon Steel Plate from Japan

The Secretary of the Treasury makes public a finding of dumping with respect to carbon steel plate from Japan. Section 153.46, Customs Regulations, is amended

DEPARTMENT OF THE TREASURY,
Washington, D.C.

TITLE 19—CUSTOMS DUTIES

CHAPTER 1—UNITED STATES CUSTOMS SERVICE

PART 153—ANTIDUMPING

AGENCY: U.S. Treasury Department

ACTION: Finding of Dumping

SUMMARY: This notice is to inform the public that separate investigations conducted under the Antidumping Act, 1921, as amended, by the U.S. Treasury Department and the International Trade Commission, respectively, have resulted in determinations that carbon steel plate from Japan is being sold at less than fair value and that those sales are injuring an industry in the United States. On this basis, a finding of dumping is being issued, and generally, all unappraised entries of this merchandise will be liable for the possible assessment of special dumping duties.

EFFECTIVE DATE: May 30, 1978.

FOR FURTHER INFORMATION CONTACT: Stephen Nyschot, U.S. Customs Service, Office of Operations, Duty Assessment Division, Technical Branch, 1301 Constitution Avenue, N.W., Washington, D.C. 20229 (202-566-5492).

SUPPLEMENTARY INFORMATION: Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), gives the Secretary of the Treasury responsibility for determining whether imported merchandise is being sold at less than fair value. Pursuant to this authority the Secretary of the Treasury has determined that carbon steel plate from Japan is being sold at less than fair value within the meaning of section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)). (Published in the FEDERAL REGISTER of January 13, 1978 (43 F.R. 2032)). An "Amended Determination of Sales at Less Than Fair Value" was published in the FEDERAL REGISTER of March 27, 1978 (43 F.R. 12780).

Section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), gives the United States International Trade Commission responsibility for determining whether by reason of such sales at less than fair value a domestic industry is being or is likely to be injured. The United States International Trade Commission has determined, and on April 18, 1978, it notified the Secretary of the Treasury that a domestic industry is being injured by reason of less than fair value imports of carbon steel plate from Japan. (Published in the FEDERAL REGISTER of April 24, 1978 (43 F.R. 17410)).

On behalf of the Secretary of the Treasury, I hereby make public these determinations, which constitute a finding of dumping with respect to carbon steel plate from Japan.

For purposes of this notice, the term "carbon steel plate" means hot-rolled carbon steel plate, 0.1875 (3/16) inches or more in thickness, over 8 inches in width, not in coils, not pickled, not coated or plated with metal, not clad, and not cut, pressed, or stamped to non-rectangular shape.

Section 153.46 of the Customs Regulations (19 CFR 153.46) is amended by adding the following to the list of findings of dumping currently in effect:

Merchandise	*Country*	*T.D.*
Carbon steel plate	Japan	78–150

(Secs. 201, 407, 42 Stat. 11, as amended, 18 (19 U.S.C. 160, 173)).

ated May 23, 1978:

ROBERT H. MUNDHEIM,
General Counsel of the Treasury.

[Published in the FEDERAL REGISTER May 30, 1978 (43 FR 22937)]

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1206)

THE UNITED STATES *v.* MOBAY CHEMICAL CORPORATION, No. 7724; (—F. 2d—)

1. CLASSIFICATION OF IMPORTS–URETHANE PASTES–TSUS

Summary judgment of Customs Court, sustaining claims that imported urethane pastes are classifiable as plastic materials under item 405.25, TSUS, rather than as colors, dyes, stains, and related products under either item 406.50 or 406.70, reversed and remanded.

2. ID.

Urethane pastes are not classifiable under item 405.25, TSUS, solely because they have an ability to form plastic articles.

3. ID.–"MORE THAN" DOCTRINE

Urethane pastes are not precluded from classification under item 406.50 or 406.70, TSUS, because they are "more than" colors, there being no indication that such color provisions do not cover coloring pigments admixed with other ingredients which impart compatibility with materials to be colored.

4. ID.–SPECIFIC USE

Between a general descriptive provision, item 405.25, TSUS, and a provision for specific use, item 406.50 or 406.70, the use provision is more specific.

5. ID.

Use made of imported pastes constituted an issue of fact material to determination of proper classification.

6. CUSTOMS COURT–JURISDICTION

Counsel's failure to file with complaint proof of authorization from successor corporation or to file in the name of that corporation did not deprive Customs Court of jurisdiction, where government was not unduly burdened or disabled in preparation of its case.

United States Court of Customs and Patent Appeals, May 18, 1978

Appeal from United States Customs Court, C.D. 4685

[REVERSED AND REMANDED]

Barbara Allen Babcock, Assistant Attorney General, *David W. Cohen*, Chief Customs Section, *Susan Handler-Menahem*, *Herbert P. Larsen* for the United States.

Sharretts, Paley, Carter & Blauvelt, attorneys of record, for appellee, *Peter Jay Baskin*, *Donald W. Paley*, *Gail T. Cumins*, of counsel.

[Oral argument on April 3, 1978 by Susan Handler-Menahem for appellant and by Peter Jay Baskin for appellee]

Before MARKEY, Chief Judge, RICH, BALDWIN, LANE, and MILLER, Associate Judges.

MARKEY, Chief Judge.

[1] The Government appeals from summary judgment of the United States Customs Court, 78 Cust. Ct. 1, C.D. 4685, 435 F. Supp. 1217 (1977), sustaining Mobay Chemical Corporation's (Mobay's) classification protest relating to imported urethane pastes.[1] The Customs Court held that proper classification was under item 405.25, TSUS, as "Plastics materials." We reverse and remand.

Issues

The decisive issue is whether the Customs Court erred in determining the absence of genuine issue of material fact. A second issue is whether the Customs Court lacked jurisdiction in three cases instituted by attorneys for Mobay's predecessor, Verona Corporation, after that corporation had been merged and dissolved.

Statute

The TSUS and pertinent headnote provisions are:

SCHEDULE 4. – CHEMICALS AND RELATED PRODUCTS
Part 1. – Benzenoid Chemicals and Products

Subpart C. – Finished Organic Chemical Products

Subpart C headnotes:

* * * * * * *

3. The term "plastics materials" in item 405.25 embraces products formed by the condensation, polymerization, or copolymerization of organic chemicals and to which plasticizers, fillers, colors, or extenders may have been added. The term includes, but is not limited to, phenolic and other tar-acid resins, styrene resins, alkyd and polyester resins based on phthalic anhydride,

[1] This appeal involves a consolidation of seventy protests and one civil action. The initial, claimed, and alternative classifications in these cases involved items 409.00, "Mixtures * * *;" 406.50, "Colors, dyes, and stain * * *;" 406.70, "Color lakes and toners * * *;" and 405.25, "Plastics materials." On this appeal, the competing provisions are 406.50 and 406.70 on the one side and 405.25 on the other.

coumarone-indene resins, urethane, epoxy, toluene sulfonamide, maleic, fumaric, aniline, and polyamide resins, and other synthetic resins. The plastic materials may be in solid, semisolid, or liquid condition, such as flakes, powders, pellets, granules, solutions, emulsions, and other basic forms not further processed.

* * * * * * *

Products obtained, derived, or manufactured in whole or in part from any product provided for in subpart A or B of this part:

* * * * * * *

405.25 Plastics materials----------

Colors, dyes, stains, and related products:

* * * * * * *

406.50 Colors, dyes, and stains (except toners), whether soluble or not in water, obtained, derived, or manufactured in whole or in part from any product provided for in subpart A or B of this part---------

* * * * * * *

406.70 Color lakes and toners, obtained, derived, or manufactured in whole or in part from natural alizarin, natural indigo, or any product provided for in subpart A or B of this part----------

The Imported Merchandise

The urethane pastes are imported in liquid form and consist of a polyester resin derived from adipic acid, a coloring pigment, and tributyl phosphate, a plasticizer. Adipic acid is admittedly a chemical product obtained from a product provided for in Schedule 4, part 1, Subpart A or B as required by the superior heading to item 405.25. The urethane pastes are manufactured by Bayer AG of West Germany by mixing polyester resin and a coloring pigment in a machine called a kneader. Different coloring pigments are added to achieve different colors in the pastes.[2]

Statements of the Parties

Mobay and the Government submitted statements of material facts, which statements were in essential conflict respecting the use to which the pastes are put.

[2] The government has conceded that urethane white and black pastes are properly classifiable under item 405.25. At oral argument the government explained that white and black pastes contain no benzenoid pigments.

Mobay alleges that the urethane pastes "can be made into a plastic article directly or after having been extended with other materials such as polyesters and polyethers." The government asserts:

> The imported merchandise is not made into plastics articles, but is used to color plastics materials which are made into plastics articles of a desired color. The imported merchandise is a color which is added to plastics materials at very low ratios. Although theoretically capable of transformation into a plastics article directly, defendant [government] has discovered not a single instance of commercial utilization of this theoretical capability.

Mobay's second contested allegation is that "the urethane pastes play a dual role by introducing polymeric content and color into the final product." The government responds:

> The urethane pastes are not used to form plastics articles, but only to color them. Thus, the urethane pastes play only a single role. The only purpose of the polymeric content of the merchandise is to facilitate the introduction of the pigment into plastics materials so as to produce plastics articles of a particular desired color.

The third contention challenged by the government is that: "[t]he imported merchandise is a product formed by the condensation of organic chemicals to which a plasticizer and color have been added," to which the government responds:

> The merchandise is a pigment to which polymer and plasticizer have been added. The sole purpose for the addition of polymer and plasticizer is to render the pigment compatible with the plastics material it is used to color.

The government also denied Mobay's assertion that the issues raised in the present case were decided in *Verona Dyestuffs Div. of Verona-Pharma Chemical Corp.* v. *United States*, 69 Cust. Ct. 26, C.D. 4369 (1972).[3]

Having submitted a number of affidavits concerning actual use of the urethane pastes, the government alleged that the following are issues of material fact which must be determined at trial:

1. The imported merchandise is a product whose primary purpose and basic nature is that of a coloring agent.
2. The merchandise does not contain a commercially significant or meaningful admixture of plastic raw materials.
3. The merchandise is coloring additives to other plastics materials, and contains only sufficient polymer and plasticizer to expedite and accomplish its purpose as a coloring agent.

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[3] In *Verona*, the merchandise at issue differed from the present pastes only in amount and color of pigment used. The pastes in *Verona* were classified under item 409.00, TSUS, as benzenoid mixtures. Proper classification was held by the court to be under item 405.25, TSUS, because the pastes had the ability to form plastic articles by themselves. Unlike *Verona*, the present case involves a comparison between the benzenoid plastics material provision, item 405.25, and the benzenoid color provision, items 406.50 and 406.70.

4. The merchandise is a color toner, classificable under item 406.70, Tariff Schedules of the United States (TSUS).

All were denied by Mobay. Regarding issues 1 and 2, Mobay says that both were determined in *Verona, supra*, i.e., the pastes perform a dual role of forming plastic aritcles and introducing color to the articles, and that plastics raw materials constitute a commercially significant quantity (approximately 75 percent) of the pastes. On issue 3, Mobay relies upon its initial contention that the pastes can be made into a plastic article directly or combined with other materials such as polyesters or polyethers. Issue 4, Mobay says, is an issue of law, not fact.

The Affidavits

Some of the government's affidavits are from executives of corporations which were customers of Mobay's predecessor, Verona Corporation. In general, the affidavits attest to the sole use of the imported pastes as coloring agents in urethane foam and assert that the polymer in the pastes is commercially insignificant. Moreover, the affidavits reflect a view that the pastes are not used by themselves to form final plastic articles.

Customs Court

(a) Classification

The court granted Mobay's motion for summary judgment relying on its decision in *Verona, supra*. The deciding factor in *Verona*, the court said, was the capability of the pastes to form plastic articles by themselves and, therefore, the pastes fell literally within the plain meaning of the "Plastics materials" provision (item 405.25) regardless of whether the pastes had a high pigment content. Thus, according to the court, even if the pastes were used exclusively as coloring agents, the pastes were "more than" colors and, accordingly, were properly classifiable under item 405.25. The court noted that the color provisions of the TSUS would include coloring agents in "pure" form and in other forms lacking sufficient polymer content to make plastic articles.

(b) Jurisdiction

The Customs Court granted Mobay's motion to substitute Mobay Chemical Corportation for Verona Corporation in the three cases around which the jurisdictional issue revolves. In its opinion, however, the court dismissed those actions because they had been initiated by Verona Corporation after it had been dissolved. In the court's view, Mobay was not a party whose protest had been denied, had no relation to the underlying customs transaction, and could not maintain the present actions. The court stated that the situation was similar to *Parksmith Corp.* v. *United States*, 77 Cust. Ct. 102, C.D. 4678 (1976).

After review of subsequently filed motions and memoranda, and without comment, the court vacated the dismissal of the three involved cases and entered an order requiring classiffication of the imported pastes under item 405.25.

Opinion

(a) Classification

Mobay argues: *Verona* established that the decisive factor for classification under item 405.25 was whether the pastes have the ability to form plastic articles by themselves; (2) it is admitted that the present pastes have that ability; (3) therefore, there is no material fact issue to be determined, the use to which the pastes are put being irrelevant.

Verona was not appealed to this court and has no binding effect upon our determination **[2]**. Moreover, we disagree with the court below that the pastes are classifiable under item 405.25 solely because they have an ability to form plastics articles. That single criterion is too broad.

Mobay further argues that the pastes cannot be classified within items 406.50 or 406.70 because the pastes are "more than" colors. As this court recently said, however: "To say that an article is 'more than' that described by a particular tariff provision is to say little more than that, in the opinion of the court, the provision cannot be interpreted to cover it." *The Englishtown Corp.* v. *United States*, 64 CCPA __, C.A.D. 1187, 553 F.2d 1258 (1977). The sole basis for the Customs Court's determination that the present pastes are "more than" colors is that they have the ability to form plastics articles by themselves.

The government alleges that the ability to form plastic articles is due to the presence of plasticizers and resins which are in fact used solely to make the pastes compatible with other materials. **[3]** Nothing of record indicates that the "color" provisions do not cover coloring pigments admixed with other ingredients which permit the pigments to be compatible with materials to be colored. In short, on this record, we disagree with the court below that the pastes are so much "more than" colors as to preclude classification under items 406.50 or 406.70.

As the Customs Court determined, the pastes do fall within the headnote 3 description of "plastics materials," and thus within the description of item 405.25.[4] The pastes, however, also fall within the description of "Colors, dyes, and stains," item 406.50, and "Color lakes and toners," item 406.70.

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[4] Note the broad reading of the "plastics materials" provisions in *Volkswagen of America, Inc.* v. *United States*, 68 Cust. Ct. 122, C.D. 4348, 340 F. Supp. 983 (1972), *aff'd per curiam*, 61 CCPA 41, C.A.D. 1115, 494 F.2d 703 (1974).

Classification of an article falling within the literal description of two or more items is governed by General Interpretative Rule 10(c):

> [A]n imported article which is described in two or more provisions * * * is classifiable in the provision which most specifically describes it; but * * * :
>
> * * * * *
>
> (ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., * * * the primary * * * headings * * *.

The primary headings requiring comparison in the present case are:

> Products obtained, derived, or manufactured in whole or in part from any product provided for in subpart A or B of this part:
>
> and
>
> Colors, dyes, stains, and related products:

The government argues that the color provisions are more specific than the "Products obtained" provisions. Mobay has not argued otherwise. Though we agree that the color provisions can be considered as more specifically describing the article than a general descriptive provision encompassing such diverse products as explosives (item 405.04), ink powders (item 405.10) and pesticides (item 405.15), we rest our decision in the present case on consideration of items 406.50 and 406.70 as use provisions.

The government has pointed out, and Mobay has not denied, that tariff provisions for colors and color toners have long been considered use provisions. *Illfelder & Co.* v. *United States*, 7 Ct. Cust. Appls. 53, T.D. 36311 (1916); *Collins & Co.* v. *United States*, 3 Ct. Cust. Appls. 83, T.D. 32356 (1912); *Drakenfeld & Co.* v. *United States*, 2 Ct. Cust. Appls. 512, T.D. 32248 (1912); *De Ronde* v. *United States*, 1 Ct. Cust. Appls. 104, T.D. 31112 (1910). **[4]** Between a general descriptive provision and a provision for a specific use, we consider the use provision here to be more specific.

Not every issue of fact is "material," and thus capable of precluding summary judgment. In the present case the Customs Court considered the issue touching the use made of the imported pastes as immaterial, holding classification proper under item 405.25 even if it were shown that the imported pastes were solely used as colors. Arguing merely that the issue is irrelevant, Mobay has neither admitted nor denied that the imported pastes are used only as colors, and must on the present record by considered as having denied the government's allegation that they are so used. **[5]** For the reasons stated, we have concluded that the use made of the imported pastes constituted an issue of fact material to determination of proper classification in this case; that if the pastes are used only as coloring agents, the proper

classification should be under either item 406.50 or 406.70; and that the grant of summary judgment was therefore in error.

(b) Jurisdiction

Jurisdiction is accorded the Customs Court, 28 USC 1582, to determine:

> [C]ivil actions instituted by any person whose protest * * * has been denied * * *.

Though the complaints were filed in the name of the protestor, Verona Corporation, that corporation had at the time the complaints were filed been combined with others, through mesne combinations ultimately into Mobay, the presently named complainant. The government contends that:

> [T]he attorneys for the defunct Verona Corporation purported to commence this action, as agents for that entity, after its dissolution. This is impermissible. The rule is well established that the death or dissolution of a principal, absent circumstances giving authority coupled with an interest, terminates the agency. [Citation omitted.]
>
> There has been no showing that Mobay Chemical Corporation retained the law firm of one of its predecessors to commence and prosecute actions on its behalf.[27]
>
> * * * * *
>
> [27] The trial court may have considered an affidavit, filed *ex parte*, and apparently received in chambers on May 26, 1977. This affidavit, to which we has no opportunity to respond, fails to state that the disputed actions were filed by counsel as agent or or attorney for the surviving corporation.

The affidavit referred to is by Donald W. Paley, attorney for Mobay, who stated therein that the law firm of which he is a member represented Verona Corporation, its successor Baychem Corporation, and the present Mobay Corporation. Paley further stated that "there has been a continuous understanding up to and subsequent to the merger * * * that we were to continue to prosecute these actions on behalf of our client and that that understanding was unaltered by reason of the merger."

The practice of filing ex parte communications with the court cannot be condoned. Because the present communication has no effect on determination of the jurisdictional issue, its ex parte character may be disregarded without creating the appearance or implication of an endorsement of the practice. Fairness and integrity of the judicial process continue to require that opposing parties be informed of and normally provided opportunity to respond to communications with the court. That the government has not challenged the

affidavit statements as false, misleading, or rebuttable, does not alter the impropriety of the affidavits having been filed ex parte.

The affidavit is irrelevant because the challenge that prompted it is irrelevant. The government does not challenge Mobay's accession to the rights of Verona, and does not allege absence of a continuity of interest on the part of the successive corporations in the subject protests. The government merely challenges the authenticity of counsel's authorization to prosecute the actions. **[6]** Absent some evidence, other than the formal omission to file appropriate documents reflecting a continuity of corporate interest and counsel authorization, we will not presume that counsel has acted on a lark and without authorization.[5] That presumption would be particularly inappropriate where, as here, its indulgence would result in harm to a party. As this court has said, "statutes giving the right of appeal are to be liberally construed in furtherance of justice." *United States* v. *Godknecht, Inc.*, 62 CCPA 86, C.A.D. 1151, 515 F. 2d 1145 (1975). Neither party relied on *Parksmith*, supra. The government does not appear to have been unduly burdened, or to have been disabled in preparation of its case in any manner, by counsel's failure to file with the complaint proof of authorization from the appropriate successor corporation or to file in the name of that corporation. Accordingly, we agree with the Customs Court that it had jurisdiction with respect to the three protests involved in the government's jurisdictional challenge.

Conclusion

The judgment of the Customs Court is *reversed* and the case is *remanded* for proceedings consistent with this opinion.

BALDWIN, Judge, dissenting.

I would affirm the judgment below for the reasons given in the Customs Court opinion.

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[5] Nor will counsel be presumed to have committed champerty, professional misconduct under N.Y. Jud. Law § 90 (McKinney 1968).

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4741)

J. C. PENNEY PURCHASING CORPORATION ET AL. *v.* UNITED STATES

Buying commissions

The evidence of record establishes that a Japanese company, known as the Sanyei Corporation, was a bona fide buying agent of plaintiff J. C. Penney Purchasing Corporation and it is therefore held that the amounts paid to Sanyei and described on the invoices as commissions were improperly included in the appraised values of the merchandise at bar.

CRITERIA FOR PRINCIPAL–AGENT RELATIONSHIP

No single factor is determinative in establishing the existence of a bona fide buying agency relationship. The existence of such a relationship must be ascertained by examining all relevant factors and each case is governed by its own particular facts.

However, the primary consideration in determining whether the relationship is one of agency is the right of the principal to control the agent's conduct with respect to the matters entrusted to him.

Court Nos. R67/3007, etc.

Ports of Seattle, San Francisco, Los Angeles and Norfolk

[Judgment for plaintiffs.]

(Decided May 8, 1978)

John B. Pellegrini and *Joseph R. Krajci* for the plaintiffs.
Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

MALETZ, Judge: These 58 consolidated appeals for reappraisement involve the proper dutiable value of various merchandise imported from Hong Kong and Japan during the period 1965 through 1970. The merchandise was entered at the ports of Seattle, San Francisco, Los Angeles, and Norfolk by J. C. Penney Company Inc. (hereinafter Penney) or J. C. Penney Purchasing Corporation [1] (hereinafter Purchasing). The basis of appraisement is not in issue since it is agreed that export value as defined in section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956 (19 U.S.C. 1401a), is the proper basis for appraisement. The parties also agree that each of the appraisements is separable and plaintiffs rely upon the presumption of correctness as to all elements of value except the alleged buying commissions.[2] Thus, the parties agree that the sole issue presented is whether certain charges listed on the invoices encompassed by the entry papers as "buying commissions" or "handling commissions" are properly included as part of the dutiable export value of the imported merchandise. Stated otherwise, the sole issue is whether a Japanese company, known as the Sanyei Corporation (hereinafter referred to as Sanyei), was a bona fide buying agent of Purchasing and whether the amounts paid to it by Purchasing were buying commissions.

THE STATUTE

Section 402(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1401a), reads as follows:

> (b) EXPORT VALUE.—For the purposes of this section, the export value of imported merchandise shall be the price, at the

[1] Purchasing is a wholly owned subsidiary of Penney, and its primary purpose is to import Penney's merchandise bought overseas.

[2] Although some of the complaints in these actions contest the dutiability of certain inland charges, plaintiffs have abandoned all claims relative to the dutiability of such charges.

time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

The Record

We consider first the record which consists of the testimony of three witnesses on behalf of the plaintiffs [3] and five exhibits also introduced by plaintiffs. Defendant presented no witnesses but introduced five exhibits. The official papers were received in evidence as unmarked exhibits.

In the circumstances of the present case, the record is best understood by summarizing the testimony of the witnesses.

Testimony of Robert Boulogne

Plaintiffs' first witness, Robert Boulogne, testified that from the latter part of 1964 through mid-1968 he was the manager of Penney's Far East buying operations, which operations had offices in Osaka, Tokyo and Hong Kong. He stated that in this capacity he was responsible for furnishing market information to Penney's central buyers and for providing full buying services and assistance in connection with Penney's purchases in the Far East.

Continuing, Mr. Boulogne testified to the following effect:

Purchasing was a wholly owned subsidiary of Penney and was established for the primary purpose of directly importing merchandise from overseas. The buyers employed by Penney purchased both domestic and imported merchandise; however, when these buyers purchased imports on a direct basis, they did so by instructing Purchasing as to what to buy, whereupon Purchasing entered into buying contracts with suppliers. As a result of this arrangement, the merchandise thus purchased was owned by Purchasing until such time as it was landed in the United States when Purchasing then sold it to Penney and title passed from Purchasing to Penney. Purchasing did not make a profit on its sales to Penney and therefore Penney paid the amount shown on the invoice.

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[3] Plaintiffs' three witnesses were: (1) Robert Boulogne, the manager of the international buying department of Penney, who during the latter part of 1964 through mid-1968 was the manager of Penney's Far East buying operations and was also vice president of Purchasing; (2) George Koegler, Penney's import-export manager for operations; and (3) T. Mizoguchi, vice president of United States and Canadian operations and president of Sanyei, New York. Further, based on the weight of the credible evidence, it is found that Mr. Mizoguchi was director of Sanyei's Osaka office in Japan from 1966 to 1970.

Purchasing had a staff in the Far East which, in addition to Mr. Boulogne, consisted of approximately 12 people in Osaka, seven or eight people in Tokyo, and three to five people in Hong Kong. These employees were known as market representatives, and each of them was assigned a commodity and a territory. The market representatives were foreign nationals who could speak English and act as translators for buyers. As a further part of their duties, they handled correspondence for the merchandise within their repsective areas of responsibility; conducted inspections in order to ensure that merchandise conformed to specifications; and researched the market in an attempt to discover which products in their respective areas were suitable for Penney's buyers. In fact, if a Penney buyer wanted to purchase directly from a manufacturer, it was done through Purchasing's market representatives.

Although Purchasing performed the same functions as a buying agent, its staff and facilities were not adequate to cope with the large volume of business Penney conducted in the Far Eastern area. Thus, in order to provide the necessary buying services in that marketplace for "sundry" merchandise such as that involved here (i.e., merchandise comprised of small items manufactured, in some instances, by small, difficult to reach factories), Purchasing would have needed a staff of 150 people and would have had to expand its facilities. Purchasing, however, desired to maintain flexibility in its Far Eastern operations, and to that end it did not expand but rather chose to keep its staff small and its overhead low. In light of this policy, Purchasing needed a buying agent to handle its volume and therefore entered into agency agreements with Sanyei to provide the necessary buying services, particularly for "sundry" merchandise, in Tokyo, Osaka, and Nagoya, Japan, as well as in Hong Kong. In this connection, one large manufacturer of sundry merchandise attempted to sell Penney on a direct basis, but Penney chose not to do so because it felt it didn't have the personnel and facilities to perform the services Sanyei provided.

The first "Agency Agreement" between Purchasing and Sanyei was dated June 26, 1964 and was entered into by Purchasing and Sanyei's Hong Hong office, while the second, dated July 6, 1964, was entered into by Purchasing and Sanyei's Tokyo office. The language of the two agreements was identical and the agreements in their entirety provided as follows:

> This is to confirm our arrangements made with you whereby you agreed to purchase merchandise for our account, as specified in our orders and contracts forwarded &/or to be forwarded to you. Upon receipt of our orders and contracts you will purchase merchandise for our account for which service we will pay you

varying percentages of buying commission depending on the merchandise bought and the maximum commission will be 5%. If purchased from vendors who usually quote on an "ex-factory" basis the commission will be based on the "ex-factory" price – or if purchased from vendors who usually quote on an "F.O.B." basis, the commission will be based on the "F.O.B." price. The names of the manufacturers for each items [sic] invoiced must also appear on the invoices.

A third "Agency Agreement," dated August 13, 1969, was entered into by Purchasing and Sanyei's Osaka office and superseded the first two agreements. This third agreement was in the form of a letter from Purchasing to Sanyei which was agreed to by Sanyei and read as follows:

This letter designates you as one of our buying agents.

This agency agreement is non-exclusive. The relationship between you and us is subject to the terms and conditions set forth below and in each of our import contracts placed with you.

1. You shall perform for us the following services:

(a) You will actively investigate buying possibilities which might be of interest to this Company both on your own initiative and as requested by us.

(b) You will purchase and forward to our Far East offices or our United States buyers samples of merchandise as requested by our Far East offices or our United States buyers.

(c) We will send you import contracts for merchandise we desire to purchase. You will purchase the merchandise described in the contract at the cost as stated in the contract, and will charge to us a commission equal to the percentage of the rate stated in the contract. You will purchase the merchandise described in the contract from the supplier designated in the contract, and the name/s of the manufacturer/s of each item must appear on such invoice/s. You agree to indemnify and hold us harmless against and from all claims of suppliers.

(d) All merchandise purchased by us under contract with you as aforesaid shall first be inspected and approved by you before being shipped to us, and our letters of credit or other methods of payment will be subject to your approval as a condition of payment. You agree that your approval will be granted only if such merchandise (i) conforms to our specifications as set forth in the applicable contract (and all amendments thereto) and is not defective in any respect, (ii) meets the requirements of all U.S. Government laws and regulations as specified in the applicable contract, (iii) is

packaged, labeled, priced and invoiced in accordance with the instructions set forth in the applicable contract, and (iv) is packaged in a manner which will insure its safe transportation to this Company's stores or warehouses.

(e) In the case of claims of this Company resulting from defective or rejected merchandise (including, but without limitation, defects discovered after receipt and resale by J. C. Penney Company), you will reimburse us for such defective or rejected merchandise.

(f) Should we send to you labels and tags for use by the supplier, it is understood that you will be billed and you in turn will obtain payment for us from the supplier for such labels and tags. In the event you fail to obtain such payment from the suppliers, you shall be directly liable to us for the amount of such payment at the billing price.

(g) You agree that you will work only with reputable suppliers with sound credit ratings, who are capable of meeting the terms of their contracts. If we shall so request, you will supply us with credit reports and other information concerning suppliers with whom you are, or may be, dealing on our behalf.

2. In consideration of the performance by you of services as one of our buying agents, we agree to pay you the commission at the rate set forth in the import contracts placed with you. The commissions shall not exceed 5% of the supplier's ex-factory (or f.o.b. shipping point) selling price unless otherwise specially agreed by you and us. The commission specified in the import contracts shall represent your entire compensation for work performed on our behalf and you shall not be entitled to any further compensation or reimbursement except that you shall receive reimbursement for the cost of samples forwarded to us pursuant to 1(b) above and related shipping costs.

3. It is understood that you are an independent contractor and that the arrangement between us does not constitute a partnership or employee relationship. No contract for the purchase of merchandise by this Company shall become effective unless signed by a person authorized to sign in the name of the Company and by our appropriate U.S. buyer. No agreement or commitment made on our behalf is binding on us without a confirmation by cable or other writing by a person authorized to act in the name of the Company.

4. The purchase price of all merchandise contracted for will be stated in United States dollars. Our sole responsibility

shall be to pay for such merchandise the amount in United States dollars set forth in our contract.

5. This agreement may be terminated by either party at any time by giving the other party prior written notice of the effective date of termination.

6. Upon termination of this agreement, (a) all right and obligations of the parties hereto shall cease and terminate except as to rights and obligations accrued prior to the date of such termination, including rights and obligations under outstanding import contracts not yet performed (b) we shall have the right to deal with all suppliers used by you in connection with business for us either directly or through one or more other buying agents without further obligations to you, and (c) you shall turn over to us any and all copies of contracts and other information in your files relating to arrangements made by you with suppliers of merchandise to us (it being understood that all such contracts and other information shall be treated by you as confidential and shall not be disclosed by you to any third party either during or after the term hereof).

7. This arrangement supersedes all previous arrangements between us.

8. This agreement has been executed in accordance with, and shall be governed by, the laws of the State of New York, United States of America.

If the foregoing terms and conditions are satisfactory to you, please sign and return to us the enclosed copy of this letter, whereupon this letter shall consitute a binding agreement between us effective as of the date of this letter.

Against this background, the normal purchasing situation was initiated by the Penney buyer apprising Purchasing of the type of merchandise he was seeking. Purchasing then advised Sanyei of the specified merchandise and Sanyei in turn researched the market, contacted manufacturers, and obtained samples in preparation for the buyer's visit.

The samples obtained by Sanyei were displayed to the buyer in Sanyei's showroom (which in Osaka was about 40 feet by 60 feet) where the price of the merchandise was usually marked on the samples and Sanyei would then give the buyer various estimates of costs above the price marked on the samples, which costs included inland charges, storage charges, lighterage, etc. This enabled the buyer to have an estimate of the f.o.b. price of the article. On the buyer's first visitation, Sanyei's showroom would collect a fairly large selection of samples of the Penney buyer to give him an idea of what was

available in the market. However, Sanyei did not display a full line of merchandise or, at any given time, have samples for every type of article. Nor did Sanyei maintain an inventory. As the buyer got the feel of merchandise, he would become more specific as to which manufacturers to go to and what areas and groupings of merchandise he would want to see.

In the usual situation, the buyer would first to go to Sanyei's showroom and then proceed to the factory with representatives from both Sanyei and Purchasing. About 20%–30% of a buyer's time was spent at Sanyei and 70% at factories.[4] Substantial negotiations took place at the factory, but in the main, the finalization of these negotiations was conducted in Sanyei's offices where the Penney buyer made a final review of the merchandise submitted by the manufacturer. A price would be decided upon, and a firm decision to purchase a particular commodity would be made. When this occurred, Purchasing would enter into a contract for the particular merchandise, indicating a specific quantity and delivery date. These contracts were between Purchasing and Sanyei and were signed by one of Purchasing's officials. Each contract contained, in the lower right-hand corner, a heading which we stated "We accept and agree to fill this order as per terms and conditions of above contract," which was signed by the party to whom "the contract is made out to." In the present cases, the party is Sanyei. Neither Purchasing nor Penney signed any contracts for the sale of this merchandise with the manufacturers of the merchandise. The witness assumed that title passed from Sanyei to Purchasing and not from the suppliers to Purchasing.

In some contracts between Purchasing and Sanyei, the name of the manufacturer was not specified, while in other contracts the name of the manufacturer was specified. However, Purchasing's market representatives had the responsibility of insuring that the factory designated by the Penney buyer produced the merchandise. Thus, after the Penney buyer specified a particular manufacturer, a market representative of Purchasing almost always followed up by making sure that Sanyei obtained the merchandise from that manufacturer.

The manufacturers would have had to know that merchandise was destined for Penney because a great deal of the merchandise had Penney identification labels. This they would also have known from buyer visitations and Penney carton markings.

Upon receipt of the contract, Sanyei would issue an order to the manufacturer on behalf of Purchasing and would service the contracts,

[4] In a previous deposition, Mr. Boulogne testified that a Penney handbag buyer would spend only about 30% of his time at the factory.

inspect the merchandise at the factory, take care of the documentation, mark the shipments and transmit further instructions which Purchasing gave to Sanyei, such as changes in packaging specifications. Sanyei would arrange for the shipment of the merchandise from the factory to Sanyei's warehouse or to the port of debarkation. Penney never paid for merchandise before it was aboard the vessel. The merchandise was insured, and if it was lost before it was laden aboard the vessel, Sanyei would process the insurance claim for Purchasing. If there was nonconforming merchandise, Sanyei would obtain restitution from the manufacturer and a cash payment was drawn against Sanyei. In such situations, Purchasing was never compensated by the manufacturer directly.

Purchasing's payment for merchandise was effected through letters of credit drawn to Sanyei. Upon presentation of the proper documentation which included invoices of Sanyei covering the merchandise in question and specified documents including certificates of inspection, the bank would make payment to Sanyei against Purchasing's letter of credit. It was not necessary for Sanyei to present the invoices from the actual manufacturers nor the receipts for transportation charges from the Sanyei warehouses to the ship in order to collect on Purchasing's letters of credit. Receipts from the transportation companies were not needed by Purchasing because Purchasing purchased f.o.b.

In the event a manufacturer could not produce a certain product, Sanyei could not use another manufacturer without Purchasing's authority to do so for the reason that qualities between manufacturers varied. Such authority by Purchasing was necessary even if a substitute product was of equal price and equal quality and notwithstanding that it would make no difference to Penney as to who manufactured the article.

Purchasing paid Sanyei a buying commission of 5% of the ex-factory price.[5] There was no separate charge for the inspection services which Sanyei performed for Purchasing; instead, compensation for such inspection services (which Sanyei always performed on each shipment for Purchasing) was included in the 5% commission. Sanyei was required to present a certificate of inspection with the document package provided to Purchasing, certifying that Sanyei had inspected the goods to ensure that the goods conformed to Purchasing's specifications. This certificate was required before Sanyei could receive payment through the letter of credit.

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[5] Initially, Mr. Boulogne testified that a 5% commission was always paid (R. 27-28). Later he modified this and testified that in 99% of the instances he recalled a 5% commission was paid (R. 76-77). More specifically, the official papers indicate that the 58 entries here involved cover 65 orders. Of these 65 orders, the official papers show that a commission of 5% was paid on 60 orders; a commission of 3% was paid on two orders; and a commission of 2% was paid on three orders. See Appendix A of defendant's brief.

Testimony of T. Mizoguchi [6]

Mr. Mizoguchi, who was director of Sanyei's Osaka office from 1966 to 1970 (see note 3, *supra*), testified to the following effect:

During the above period, Purchasing would advise Sanyei that it was interested in certain items specifying the price range, color, size and other details. Sanyei would obtain samples meeting these requirements and make all the necessary preparations for the purchase of these items. Frequently, marketing representatives from Purchasing would work in conjuction with Sanyei in negotiating price and arranging for the manufacture of these articles. These negotiations and arrangements would take place either at Sanyei's showrooms or at the manufacturer's factory.

Sanyei would do nothing until it received a contract of purchase and a letter of credit from Purchasing at which time Sanyei would place the order. Before the manufacturer completed the order, Sanyei personnel would inspect the goods against the sample at the factory; in some instances, Purchasing market representatives would accompany them on these inspections. If the goods were satisfactory the manufacturer would then ship them to the Sanyei warehouse. During this time if the goods were destroyed or lost, the responsibility for the loss was on the manufacturer.

When the merchandise reached the warehouse, Sanyei would ask Purchasing to inspect the goods and would receive further shipping instructions. Iu situations where the manufacturer could not fill an order or the manufacturer stated it could not meet the negotiated price, Sanyei would always request further instructions from Purchasing before taking any further action.

Sanyei never received compensation from, never invested money with, nor did it ever share its commissions with any of the manufacturers supplying Penney. Furthermore, the manufacturers' invoice prices were the same prices Sanyei invoiced Penney for the merchandise.

Sanyei was paid by a letter of credit issued by Purchasing and it would borrow money against these letters of credit. Sanyei paid the manufacturer 70% to 80% of the full amount of the letter of credit and paid the balance due after shipment was made to Purchasing.

Sanyei insured the merchandise, and if goods were lost after leaving the factory and before reaching the Sanyei warehouse, Sanyei would negotiate the claim with the insurance company on behalf of Purchasing. If goods were defective or nonconforming, Sanyei settled the claim in accordance with the Penney buyer's instructions.

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[6] Plaintiffs' third witness, George Koegler, was called for the sole purpose of identifying the Hong Kong "Agency Agreement."

Sanyei had showrooms in Osaka, Tokyo and Nagoya which never maintained an inventory. However, these showrooms had samples of a full line of merchandise.

Sanyei's commissions from Purchasing were always 5% of the ex-factory price;[7] in addition to these charges, there were shipping charges, storage insurance, inland charges, miscellaneous charges, and inspection fees.[8]

There were instances where Sanyei would borrow against Purchasing's letters of credit to advance manufacturers money to buy materials. Purchasing usually issued the letters of credit two to three months before shipment and the banks would loan Sanyei money against these letters of credit as soon as they were issued. It was not necessary for Sanyei to produce bills of lading to show the merchandise was on board a vessel in order to borrow against these letters of credit; however, Sanyei could not collect on the letters of credit until the merchandise was on the ship. Purchasing knew that Sanyei was borrowing against the letters of credit but never gave Sanyei express permission to do so and, therefore, Sanyei was responsible for these loans. During the period in question, there was no instance where a manufacturer who was advanced money to buy materials did not deliver the merchandise.

After the merchandise was manufactured, Sanyei made provisions for shipping in accordance with Purchasing's instructions. If the merchandise was lost between the factory and Sanyei's warehouse, the manufacturer bore the loss and thus collected the insurance. On the other hand, if merchandise was destroyed in the Sanyei warehouse or lost or destroyed between the warehouse and the pier, the insurance would be collected by Sanyei on behalf of Purchasing and paid to Purchasing.

Sanyei was paid by Purchasing when the merchandise was on the vessel and Sanyei presented a bill of lading to the bank. Sanyei paid the insurance premiums in advance as the agent of Purchasing and was reimbursed for such premiums as well as its 5% buying commission and other charges advanced on behalf of Penny when it presented its bill of lading quoting f.o.b. prices on the merchandise to the bank holding the letter of credit.

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[7] See note 5, *supra*.

[8] Mr. Mizoguchi's testimony that Sanyei's inspection fee was an additional charge over and above the 5% commission is in direct conflict with Mr. Boulogne's testimony that the 5% commission *included* the inspection fee. It is also in direct conflict with the third "Agency Agreement," *supra*, which provided that the commission not to exceed 5% shall represent Sanyei's *entire* compensation for work performed on Purchasing's behalf. See par. 2. The agreement further specified that included in the work Sanyei was required to perform on Purchasing's behalf was the *inspection* and approval of all merchandise purchased by Purchasing before shipment. See par. 1(d). Considering these provisions of the agency agreement and Mr. Boulogne's testimony, it must be concluded that Mr. Mizoguchi's testimony on this score was in error and that compensation for Sanyei's inspection services was included in the 5% commission.

As far as the manufacturer was concerned, his responsibility for the merchandise ended when he left the goods at Sanyei's warehouse. At that time, Purchasing owned the goods because Sanyei had a letter of credit for the goods and purchased them for Purchasing as its agent.

Manufacturers in Japan would sell to buyers directly. Therefore, Purchasing could have but chose not to buy goods directly from any of the manufacturers here involved because it did not have sufficient facilities to export these goods from Japan to the United States, and it was for that reason Purchasing utilized Sanyei's buying services.[9]

THE LAW

Turning now to the law, it is basic that the values found by the government are presumptively correct and that the plaintiffs have the burden of proving first that the appraised values are erroneous and second that the plaintiffs' claimed values are correct. However, where, as here, plaintiffs challenge but one of the elements entering into the appraisements under scrutiny and since it is agreed that the appraisements are separable, plaintiffs can rely upon the statutory presumption of correctness as to all other elements of value. E.g., *United States* v. *Imperial Products, Inc.*, 65 CCPA—, C.A.D. 1203, 570 F. 2d 337 (1978); *United States* v. *Bud Berman Sportswear, Inc.*, 55 CCPA 28, C.A.D. 929 (1967); *United States* v. *H. M. Young Associates*, 62 CCPA 20, C.A.D. 1138, 505 F. 2d 721 (1974). Thus, plaintiffs' exclusive burden is to establish that the commissions paid Sanyei were bona fide buying commissions. In defendant's words (Br. p. 25):

> * * * where an export value appraisement is made upon the basis of an ex-factory amount plus certain inland charges and an alleged buying commission, and the plaintiff claims that the ex-factory amount represents the proper export value, the plaintiff must prove that the buying agency was a true, *bona fide* principal-agent relationship. *B & W Wholesale Co., Inc.* v. *United States*, 58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971); *Park Avenue Imports* v. *United States*, 62 Cust. Ct. 1035, A.R.D. 255 (1969).
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> The appraisement in this case appears in the traditional, separable form. Thus, plaintiff, in order to establish a *prima*

[9] With regard to Sanyei's operation in Hong Kong, the testimony of Mr. Boulogne is that the services performed by Sanyei for Purchasing in Hong Kong were the same as those provided in Japan. This is supported by an affidavit of M. Hasegawa, director of Sanyei Corporation (Hong Kong) Ltd. (hereinafter Sanyei Hong Kong), which attests that his firm has acted as Purchasing's buying agent since 1963. In this capacity, according to the affidavit, Sanyei Hong Kong, acting on behalf of Purchasing, placed orders with various manufacturers, inspected merchandise, arranged for shipment and prepared the documentation. The affidavit further states that Sanyei does not buy for its own account for resale, but purchases for Purchasing only upon specific instructions. Finally, the affidavit declares that Sanyei Hong Kong received no remuneration whatsoever from any of Purchasing's manufacturers, nor did it in any way own or control such manufacturers during the period in question.

facie case and discharge its dual burden of proof, need only prove the non-dutiable character of the alleged buying commission. Its proof, however, must be by a preponderance of the credible evidence. *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, 547, R.D. 11758 (1971).

It is, of course, fundamental that a bona fide buying commission is not a proper element of dutiable value. E.g., *United States* v. *Nelson Bead Co.*, 42 CCPA 175, C.A.D. 590 (1955); *United States* v. *S. S. Kresge Co. et al.*, 26 CCPA 349, C.A.D. 39 (1939); *Knit Wits (Wiley) et al.* v. *United States*, 59 Cust. Ct. 753, R.D. 11401, 278 F. Supp. 291 (1967), *aff'd*, 62 Cust. Ct. 1008, A.R.D. 251, 296 F. Supp. 949 (1969); *Carolina Mfg. Co.* v. *United States*, 62 Cust. Ct. 850, R.D. 11640 (1969). In this setting, the court concludes for the reasons that follow that the evidence of record establishes that Sanyei was plaintiffs' bona fide buying agent and that the amounts paid to Sanyei constituted compensation for the type of services normally performed by such agents. Therefore, the amounts paid to Sanyei and described on the subject invoices as commissions were improperly included in the appraised value of the merchandise at bar.

No single factor is determinative in establishing the existence of a bona fide buying agency relationship. The existence of such a relationship must be ascertained by examining all relevant factors and each case is governed by its own particular facts. However, the primary consideration in determining whether the relationship is one of agency is the right of the principal to control the agent's conduct with respect to the matters entrusted to him. *B & W Wholesale Co., Inc.* v. *United States*, 58 CCPA 92, 95, C.A.D. 1010, 436 F. 2d 1399, 1402 (1971); *Dorf International, Inc. et al.* v. *United States*, 61 Cust. Ct. 604, 610, A.R.D. 245, 291 F. Supp. 690, 694 (1968); *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, 546, R.D. 11758, 337 F. Supp. 465 (1971). The evidence of record points to the fact that the activities of Sanyei with regard to the subject merchandise were at all times controlled by plaintiffs. The role of plaintiffs in the selection of the subject merchandise, including selection of the factory, was active, not passive, and Sanyei was given no discretion in the purchase of the subject merchandise.

More specifically, the services performed by Sanyei were similar to those provided by plaintiffs' Far East buying offices in other commodity areas. In general, Sanyei provided Penney buyers with market information and assisted them in direct import buying activities. While plaintiffs could have purchased the subject merchandise directly from the factories without Sanyei's intervention, plaintiffs chose to deal through Sanyei as an economy measure and to maintain flexibility. The fact that an importer has an opportunity to purchase

merchandise directly, without being required to seek the assistance of an intervening party, has been held to support the existence of an agency relationship. *United States* v. *Alfred Kohlberg, Inc.*, 27 CCPA 223, 227, C.A.D. 88 (1940); *United States* v. *Enrique Vidal Sanchez*, 15 Ct. Cust. Appls. 443, 450–51, T.D. 42642 (1928); *F. W. Woolworth Co. et al.* v. *United States*, 6 Cust. Ct. 729, R.D. 5094 (1941).

The record establishes that before Penney buyers traveled to Japan and Hong Kong to purchase merchandise, Sanyei was instructed to research the market and gather samples of merchandise in which the Penney buyers expressed an interest. After the general sample line gathered by Sanyei had been reviewed the buyers would choose specific items of interest. This review would be followed by factory visitations by Penney buyers accompanied by representatives of Purchasing and Sanyei. During these meetings at the factories, negotiations as to price, styling and delivery took place. The fact that the importer actually visited factories and participated in negotiations with the factory has been accorded significance by this court in finding the existence of an agency relationship. *United States* v. *Gitkin Co.*, 46 Cust. Ct. 788, 791, A.R.D. 132 (1961); *Hub Floral Mfg. Co.* v. *United States*, 60 Cust. Ct. 905, 906–7, R.D. 11544 (1968).

Another consideration is that all of the subject merchandise was purchased from the factories by Sanyei on behalf of Purchasing and that the factories were aware that plaintiffs, not Sanyei, were the purchasers of the merchandise. The fact that a factory was aware that the importer and not the intervening agent was the purchaser of merchandise has been cited by this court as evidence of a buying agency relationship between the importer and the intervening agent. *Knit Wits (Wiley) et al.* v. *United States, supra*, 59 Cust. Ct. at 761.

Beyond this, Sanyei placed orders for the subject merchandise with the factories only after having been instructed to do so by plaintiffs. If a factory was unable to fill an order placed by Sanyei for plaintiffs, Sanyei had to look to plaintiffs for further instructions since Sanyei could not choose another factory without direction from plaintiffs. The fact that an intervening party can only place an order with a factory after that party has received such instructions from an importer is further evidence of the existence of a buying agency. *Knit Wits (Wiley) et al.* v. *United States, supra*, 59 Cust. Ct. at 761; *United States* v. *Supreme Merchandise Company*, 48 Cust. Ct. 714, 719, A.R.D. 145 (1962).

The record also demonstrates that Sanyei, in addition to compiling market information, gathering samples, and assisting in factory negotiations, performed services which included translation, inspection,

placing purchase contracts, arranging for inland shipment, and payment for merchandise. Such services are typical of those rendered by a buying agent in procuring merchandise for his principal. *United States* v. *Supreme Merchandise Company, supra*, 48 Cust. Ct. at 718; *Chadwick-Miller Importers, Inc., et al.* v. *United States*, 66 Cust. Ct. 573, R.D. 11743 (1971); *Carolina Mfg. Co.* v. *United States, supra*, 62 Cust. Ct. at 853; *Reliance International Corp.* v. *United States*, 62 Cust. Ct. 845, 849, R.D. 11639, 305 F. Supp. 20, 24 (1969).

This court in *Chadwick-Miller Importers, Inc., et al.* v. *United States, supra*, 66 Cust. Ct. at 578, in discussing an importer's testimony with respect to the tasks performed by his buying agent stated:

> * * * their services in seeking out for him manufacturers of the kinds of goods he wished to order and in negotiating price and other terms with sellers, their attention to shipping, checking deliveries and the conformity of goods to samples, and other such services, shows a relationship such as has been presented to the court in many cases where United States buyers are confronted, notably in Japan and in Hong Kong, with many small manufacturers. It is a relation founded on the necessity of having one's own represntative to speak or the buyer in such a foreign market. In customs jurisprudence these representatives are known as buying agents.

These are the same services performed by Sanyei and the reasons for engaging an agent are the same as those in the present case.

The record shows also that Sanyei had no financial interest in any of the manufacturers of the subject merchandise; that Sanyei was compensated for its services solely through a commission paid by plaintiffs; that Sanyei received no compensation or payment from the factories; and that Sanyei did not share commissions with factories. An important mark of a buying agency is the fact that none of the commission inures to the benefit of the manufacturer. *Carolina Mfg. Co.* v. *United States, supra*, 62 Cust. Ct. at 854. As the court stated in *Reliance International Corp.* v. *United States, supra*, 62 Cust. Ct. at 849:

> Commissions paid by the purchaser to agents for services rendered in procuring the merchandise, inspecting and packing goods, arranging for shipment and acting as a paymaster for account of the buyer, *no part of which commissions inure to the benefit of the seller*, are buying commissions. *United States* v. *Nelson Bead Co., supra; United States* v. *Gitkin Co.*, 46 Cust. Ct. 788, A.R.D. 132; *Lollytogs, Ltd.* v. *United States*, 55 Cust. Ct. 608, Reap. Dec. 11073; *United States* v. *Supreme Merchandise, supra*. [Emphasis added.]

An affidavit by the director of Sanyei Hong Kong (see note 8, *supra*) is further proof that the relationship between plaintiffs and Sanyei was a buying agency. The affidavit affirms that Sanyei acts as a buying agent for plaintiffs, and it emphasizes the fact that Sanyei did not buy for its own account but for plaintiffs' account, and only upon specific instructions from plaintiffs. An affidavit by a party attesting to its status as a buying agent has evidentiary weight in determining a buying agency question. *Dorco Imports* v. *United States*, 67 Cust. Ct. 503, 512, R.D. 11753 (1971); *Vicki Enterprises, Inc., et al.* v. *United States*, 67 Cust. Ct. 480, 487, R.D. 11750 (1971), *aff'd*, 68 Cust. Ct. 324, A.R.D. 302, 343 F. Supp. 1381 (1972), *aff'd*, 61 CCPA 75, C.A.D. 1125, 496, F. 2d 1403 (1974).

The existence of a buying agency is also indicated by the "Agency Agreements" quoted before. These agreements tend to prove that Sanyei's role was one of agency. In this connection, the existence of a buying agency agreement has been cited by this court as supporting a buying agency relationship, particularly in the absence of any testimony by defendant. *Dorco Imports* v. *United States, supar*, 67 Cust. Ct. at 512.

Defendant insists, however, that there was not a bona fide buying agency relationship between plaintiffs and Sanyei because, among other things, (1) the merchandise at bar was sold on an f.o.b. basis, and (2) Sanyei's commissions were an integral part of the f.o.b. prices and as such a proper element of dutiable value.

As to the first of these contentions, it is quite true that the subject merchandise was purchased on an f.o.b. basis. But the record is clear (1) that these f.o.b. prices were arrived at on the basis of the *invoiced ex-factory prices* with charges added for inland freight, insurance, lighterage and buying commissions, and (2) that the total of these charges made up the f.o.b. prices. This is reflected in the government appraisement itself which was made at the invoiced *ex-factory prices* plus the additional charges, including buying commissions. Since the appraisement is concededly separable, plaintiffs may rely on the presumption that the merchandise was *sold* at *ex-factory prices plus* the additional charges and that these ex-factory prices were the freely offered prices. See e.g., *United States* v. *Imperial Products, Inc.*, 65 CCPA—, C.A.D. 1203, 570 F. 2d 337 (1978). And it is to be added that in situations virtually identical to those here—where invoices were made out on the basis of ex-factory prices plus specified charges, and f.o.b. Japanese port prices were quoted—bona fide buying commissions were held to exist. See, e.g., *Reliance International Corp.* v. *United States*, *supra*, 62 Cust. Ct. at 847; *Carolina Mfg. Co.* v. *United States*, *supra*, 62 Cust. Ct. at 852; *United States* v. *Knitwits* (*Wiley*) *et al.*, 62 Cust.

Ct. 1008, A.R.D. 251, 296 F. Supp. 949 (1969).[10] See also *Mitsui & Co. (U.S.A.), Inc.* v. *United States*, 66 Cust. Ct. 553, R.D. 11740 (1971).

We come now to defendant's second contention that Sanyei's commissions were an integral part of the f.o.b. prices and as such a proper element of dutiable value. The basic premise of this argument is that plaintiffs could not have purchased the subject merchandise without paying a commission to Sanyei. This proposition is central to the decisions which follow that are cited by defendant in support of its argument. Thus defendant places heavy reliance on *United States* v. *Erb & Gray Scientific, Inc.*, 54 Cust. Ct. 791, A.R.D. 186 (1965), *aff'd*, 53 CCPA 46, C.A.D. 875 (1966). But in *Erb* the court found that the importer could *not* have purchased the merchandise there involved (i.e., electron microscopes) without paying certain installation and maintenance fees for the services of Japanese engineers trained by the manufacturer since such fees were necessary to make the imported microscopes operational. Accordingly, the court held that such fees were dutiable. 54 Cust. Ct. at 795, 53 CCPA at 51–52. In *Albert Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958)—which defendant also relies on—the court based its decision on the finding that the subject merchandise could not have been purchased at a price which did not include the inland freight charges. 46 CCPA at 19. The same is true of *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553 (1954), *cert. denied*, 348 U. S. 823 (1954), which defendant further cites. And in another case cited by defendant—*BBR Prestressed Tanks, Inc., et al.* v. *United States*, 64 Cust. Ct. 787, A.R.D. 265 (1970)—the court noted that the importer had no choice but to pay the alleged royalty fee. 64 Cust. Ct. at 790.

In further support of its argument, defendant refers to *International Fashions* v. *United States*, 64 CCPA—, C.A.D. 1180, 545 F. 2d 138 (1976), *aff'g* 76 Cust. Ct. 92, C.D. 4640, 408 F. Supp. 1386 (1976). While that case presents a somewhat different situation than the other cases previously cited, the case, in effect, stands for the proposition that a fee which *must* be paid by the importer is part of dutiable value. More particularly, the court in *International Fashions* held that a charge labeled as a 5% commission which was paid to the manufacturer's managing director was an expense properly includable in dutiable value since the inspection service permeated the entire manufacturing process. The court noted that if the importer desired

[10] The obvious reason why the subject merchandise was purchased on an f.o.b. basis was to enable the plaintiffs to know the total cost of the merchandise which they were purchasing and thus issue a letter of credit sufficient to cover such costs. See, e.g., *Lollytogs, Ltd.* v. *United States*, 55 Cust. Ct. 608, 611, R.D. 11073 (1965).

merchandise which was quality controlled the 5% charge had to be paid and that the seller performed the inspection services. 545 F. 2d at 139–40. Further, the lower court clearly distinguished the situation before it from cases involving buying commisssions by pointing out that a buying commission concerns the *manner* of purchase whereas the case before it concerned the *nature* of what was purchased. In short, *International Fashions*, like the other decisions on which defendant relies, is clearly distinguishable from the present case since the evidence of record clearly establishes that here plaintiffs could have purchased the subject merchandise without the intervention of Sanyei and without paying the commission. Thus the commissions here in issue were not an intergal part of the f.o.b. price.

Defendant next argues that Sanyei acted as the seller in the transaction at bar, not as plaintiffs' agent. An important element of this argument is that Sanyei assumed title to the subject merchandise and paid the manufacturer for the merchandise and, therefore, cannot be considered as plaintiffs' agent but must be considered as the seller. With respect to this argument, the record is not clear as to whether or not Sanyei obtained title to the merchandise. On the one hand, Mr. Boulogne testified that he was assuming that title passed from Sanyei to Purchasing and not from the suppliers to Purchasing. On the other hand, Mr. Mizoguchi testified that when the manufacturer transferred the goods to Sanyei's warehouse Purchasing owned the goods because Sanyei had a letter of credit for the goods and purchased them for Purchasing as its agent. In addition, the record indicates (1) that if the merchandise was lost between the factory and Sanyei's warehouse, the manufacturer bore the risk of loss and collected the insurance; and (2) that if the merchandise was destroyed in the Sanyei warehouse or lost or destroyed between the warehouse and the pier, the insurance would be collected by Sanyei on behalf of Purchasing and paid to Purchasing. In this circumstance, it would appear that Sanyei at no time had an insurable interest or bore the risk of loss which factors would tend to indicate that title passed directly from the manufacturer to Purchasing and not to Sanyei.

However, it is not necessary to determine whether or not title passed to Sanyei for even assuming *arguendo* that it did, "[t]he assumption of title" (as defendant observes, surreply brief, p. 7) "is only one factor in determining agency and the question of whether one is an agent must be determined from the total factual context." Thus in *Mitsui & Co. (U.S.A.), Inc.* v. *United States, supra*, 66 Cust. Ct. 553, the court held that the fact that an alleged buying agent took title to the goods did not preclude the court from finding that a bona fide buying agency existed. See also, e.g., *Windsor Steel Products* v.

Whizzer Industries, 157 F. Supp. 284 (E.D. Mich. 1957), *aff'd*, 261 F. 2d 837 (6th Cir. 1958). And in the total factual context here, the record is clear, as previously discussed, that the activities of Sanyei with regard to the sale of the subject merchandise were at all times controlled by plaintiffs.[11]

Additionally, defendant contends that Sanyei was not an agent because plaintiffs assertedly did not have the right to control the means through which Sanyei acted. Plaintiffs are stated to be interested solely in the results. Defendant cites Mr. Boulogne's testimony in support of this contention. The specific testimony relied upon is apparently the statement that assuming all manufacturers produced goods of equal quality and equal price Penney would not be concerned with the identity of the manufacturer. However, as Mr. Boulogne's testimony indicates, Penney was concerned with the identity of the manufacturer precisely because not all manufacturers produced goods of equal quality. In fact, the record shows that Sanyei could not substitute manufacturers without express authority from Purchasing.[12] Other indications that plaintiffs exercised control over Sanyei's activities in this respect appear evident from the facts that: Sanyei could do nothing until it obtained purchase orders from Purchsing; if a manufacturer could not meet the negotiated price, Sanyei would have to get further instructions before taking further action; if goods were defective Sanyei settled the claim according to Penney's instructions; and Penney's buyers and not Sanyei's personnel chose the particular manufacturer.

In additional support of its argument that Sanyei was not an agent because plaintiffs assertedly did not have the right to control the means through which Sanyei acted, defendant relies on two decisions: *B & W Wholesale Co., Inc.* v. *United States*, 58 CCPA 92, C.A.D. 1010, 436 F. 2d 1399 (1971), *aff'd*, 63 Cust. Ct. 691, A.R.D. 262 (1969), *aff'd*, 58 Cust. Ct. 728, R.D. 11311 (1967); and *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, R.D. 11758, 337

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[11] It is to be noted that when an agent purchases goods for his principal and for a commission, even though the agent pays the purchase price and accepts delivery, and then redelivers to his principal who reimburses the agent for all costs and expenses, the relationship between agent and principal is not a seller-buyer relationship. *Carmichael* v. *Lavengood*, 112 Ind. App. 144, 44 N.E. 2d 177 (1942). See also *John I. Haas, Inc.* v. *Ellis*, 227 Or. 170, 361 P. 2d 820 (1961).

[12] To rebut this evidence defendant analyzed the Penny purchasing contracts and noted that some of these contracts did not specify any manufacturer and some were not signed by representatives of Penney. In particular, defendant cites eight specific transactions where the manufacturer was specified as Okano Henshoku although the invoices showed that Sanyo Brush manufactured the articles. However, little weight can be given to this evidence which is based solely on the invoices, considering that two credible witnesses testified without contradiction that the identity of the manufacturers was always specified by the Penney buyers and changes could not be and were not made without the express authority of the plaintiffs. See *Davis Products, Inc., et al.* v. *United States*, 59 Cust. Ct. 226, 230-31, C.D. 3127 (1967). Also to be noted is the fact that these witnesses were not cross-examined by defendant as to these eight specific transactions.

F. Supp. 465 (1971). Both decisions are clearly distinguishable from the case at bar.

The facts in B & W Wholesale are not at all similar to those presented here. In *B & W Wholesale* the importer had no control over the alleged buying agent's choice of factories. 58 CCPA at 95. The evidence before the trial court included the fact that, in purchasing the subject merchandise, the only premises which the importer visited before placing orders were those of the alleged agent. 58 Cust. Ct. at 730.

On the other hand, the record here shows that it was plaintiffs, not Sanyei, who determined which manufacturers were to receive orders. Also, it was the general practice for plaintiffs' buyers to visit the individual manufacturers before instructing Sanyei to place orders.

Moreover, in *B & W Wholesale*, the importer had reason to believe that the inland charges were excessive, but it still did not ask the alleged buying agent to substantiate the charges. 58 Cust. Ct. at 730.

In the present case, while the record is not clear as to whether plaintiffs checked the amounts listed as inland freight charges, there is no indication that plaintiffs suspected that such charges were excessive, and in fact plaintiffs felt that Sanyei did its business in an honorable manner.

The *Globemaster* case also contains factual elements which militate against finding a principal-agent relationship. There the evidence demonstrated that the alleged buying agent bore the risk of any increase in price. 67 Cust. Ct. at 544. Here the evidence domenstrates the contrary. If a manufacturer was required to raise prices, plaintiffs were consulted and plaintiffs, not Sanyei, bore the risk. In *Globemaster* the importer never negotiated prices with manufacturers. 67 Cust. Ct. at 544. Here, it is clear that plaintiffs did negotiate price and other matters, such as quality and delivery, directly with manufacturers.

Lastly, defendant contends that Sanyei's services were identical with services performed by Purchasing's local market representatives. It is quite true that Purchasing's local market representatives performed services similar to those performed by Sanyei; however, such services were not performed with respect to the same shipments.

For the foregoing reasons, the courts concludes that the amounts paid to Sanyei represented commissions paid to a bona fide buying agent and are, therefore, buying commissions which are not a proper element of dutiable value. Therefore, it is held that export value in the present case equals the appraised values less the charges for buying commissions. Judgment will be entered accordingly.

Decisions of the United States Customs Court

Customs Rules Decisions

(C.R.D. 78-1)

PISTORINO & CO., INC. *v.* UNITED STATES

Memorandum Opinion to Accompany Order

Court No. 68/45733

Women's wearing apparel

[Motion granted.]

(Dated May 10, 1978)

Glad, Tuttle & White (*Stephen S. Spraitzar* of counsel), the moving attorneys.
Barbara Allen Babcock, Assistant Attorney General (*Saul Davis*, trial attorney), for the defendant.

LANDIS, Judge: Attorneys, Glad, Tuttle & White of San Francisco, have filed a motion to have the Court papers (without entries, invoices, or laboratory reports) in the above-entitled action, which was decided September 21, 1972 and reported in *Pistorino & Co., Inc.* v. *United States*, 69 Cust. Ct. 93, C.D. 4378, forwarded to the District Director of Customs at San Francisco, for review, to which the Government has filed a response deferring the granting of said motion to the discretion of the Court. The plaintiff in the above-entitled action, represented by other counsel, has not responded to this motion.

The question here presented is whether the moving attorneys (Glad, Tuttle & White of San Francisco, California) who did not appear in the captioned case, and who do not profess to represent either of the parties in said captioned case, may obtain an Order of this Court forwarding the Court papers (other than entries, invoices, or laboratory reports) to the District Director of Customs at San Francisco, California for review, after which they shall be returned to the Clerk of this Court.

Rule 14.3(b)(1) provides:

> Except where restricted by law * * *, any person may have access to the relevant papers in an action other than entries, invoices and laboratory reports, which shall be available only to the attorney of record or a party to the action.

The United States Customs Court is an Article III Court of nationwide jurisdiction in customs matters and while its headquarters is officially in New York City, trials may be held throughout the United States [and hearings in some cases abroad] where the reception of evidence is necessary and appropriate. 28 U.S.C. §§ 251, 256; R. Sturm, *A Manual of Customs Law*, p. 12.

As stated by the Court of Customs and Patent Appeals in *United States* v. *Fairfield Gloves et al.*, 64 CCPA —, C.A.D. 1194, 558 F. 2d 1023 (1977):

> * * * Far from unduly circumscribing litigants' rights, * * * [a rule of the Customs Court] recognizes the national jurisdiction of the Customs Court and attempts to place litigants far from the court's New York City headquarters on an equal footing with those nearby in the commencement of actions in the court.

It is manifest from legal authority, and this Court's rules and national jurisdiction that litigants and attorneys somewhat distant from New York City should not be penalized or prejudiced thereby but should be placed on an equal footing with those located nearby.

The observation of the defendant (Government) that Rule 14.5 provides for the payment of the fee by "the person at whose request photostatic copying of documents is performed" is not inconsistent with the relief here sought.

As Rule 14.3(b)(1) of this Court is explicit that "any person may have access to the relevant papers in an action other than entries, invoices and laboratory reports, which shall be available only to the attorney of record or a party to the action", the motion to have the Court papers (without entries, invoices, or laboratory reports), record, and exhibits in the instant case forwarded to the District Director of Customs at San Francisco, California for review, is sustained and it is further ordered that when said Court papers have served their purpose that they shall be returned to the Clerk of this Court forthwith. An order will be entered accordingly.

(C.R.D. 78–2)

SCM CORPORATION *v.* UNITED STATES (BROTHER INTERNATIONAL CORPORATION, PARTY-IN-INTEREST)

Antidumping—Jurisdiction

SCM, an American manufacturer, petitioned the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516(c), to impose antidumping duties on importations from Japan of portable electric typewriters. Pursuant to the Antidumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.*, the Secretary found that portable electric typewriters from Japan were being sold in the United States at less than their fair value. The International Trade Commission (ITC), however, determined that an American industry was not being and was not likely to be injured by the less than fair value sales of portable electric typewriters from Japan. Because the Antidumping Act of 1921, as amended, required both a finding by the Secretary of less than fair value sales, and an affirmative determination of injury by the ITC before antidumping duties could be assessed, the Secretary could not assess dumping duties.

Subsequently, SCM commenced an action in the federal district court seeking to review the negative injury determination of the ITC. The district court dismissed the action for lack of subject matter jurisdiction, holding that exclusive jurisdiction rested with the Customs Court under section 516. *SCM Corporation* v. *United States International Trade Commission et al.*, 404 F. Supp. 124 (D.D.C. 1975). On appeal, the court of appeals expressed doubt on the jurisdictional question presented, reversed the district court's judgment, and remanded the case with instructions to retain jurisdiction until SCM brought an action in the Customs Court enabling that court to determine whether it had subject matter jurisdiction over SCM's action.

SCM commenced an action in the Customs Court under section 516 seeking to review the negative injury determination of the ITC. SCM then moved to dismiss the action for lack of subject matter jurisdiction. The Customs Court held that it had jurisdiction to review a negative injury determination by the ITC in an American manufacturer's action brought pursuant to section 516(c) of the Tariff Act of 1930, as amended, and it therefore denied SCM's motion.

CUSTOMS COURT PRACTICE AND PROCEDURE

Where no applicable rule of the Customs Court provides the procedure by which plaintiffs may contest subject matter jurisdiction, the court will entertain and consider a plaintiff's motion to dismiss for lack of subject matter jurisdiction under Rule 1.1(b) of the Rules of the Customs Court.

STATUTORY CONSTRUCTION—LEGISLATIVE HISTORY

The pertinent legislative history of section 516 of the Tariff Act of 1930, as amended, shows that Congress intended the language of section 516(c) to extend review of the Secretary's failure to assess antidumping duties to include any factor or finding that would enter into the failure of the Secretary to assess antidumping duties.

SAME—PURPOSE OF CUSTOMS COURT

Congress established the United States Customs Court as the exclusive national tribunal for judicial review of civil litigation pertaining to customs matters in order to provide for uniformity and consistency in the interpretation and application of the customs laws, and to fulfill the requirement of the United States Constitution article I, § 8, that "all Duties, Imposts and Excise shall be uniform throughout the United States."

SAME

It is undisputed that an importer can seek review in the Customs Court of the Secretary's finding of sales at less than fair value or an affirmative injury determination of the ITC under the Antidumping Act of 1921, as amended. It is also undisputed that an American manufacture can seek review in the Customs Court of the Secretary's finding, under the Antidumping Act, of no sales at less than fair value. Not to be able to utilize the same expertise of the Customs Court in an American manufacturer's action to review a negative injury determination of the ITC is unreasonable and anomalous and would permit potentially conflicting decisions by the district courts.

RULES OF STATUTORY CONSTRUCTION

Where one among alternative possible interpretations of a statute produces an unreasonable result, that interpretation should be rejected in favor of another which would produce a reasonable result.

JURISDICTION OF THE CUSTOMS COURT

Where no adequate relief may be obtained by the plaintiff in the Customs Court, it is said that jurisdiction will lie in the district courts. The mere fact that a more desirable remedy may be available in the district courts does not necessarily mean that the remedy in the Customs Court is inadequate.

Court No. 77-4-00553

[Motion denied.]

(Dated May 11, 1978)

Stewart & Ikenson (*Eugene L. Stewart* and *Fredrick L. Ikenson* of counsel) for the plaintiff.

Barbara Allen Babcock, Assistant Attorney General (*David M. Cohen*, Chief Customs Section, and *Glenn E. Harris*, trial attorney), for the defendant.

Tanaka, Malders & Ritger (*H. William Tanaka* and *Lawrence R. Malders* of counsel) for the part-in-interest.

RE, Chief Judge: Plaintiff, SCM Corporation ("SCM"), an American manufacturer, by this action seeks to review under section 516(c) of the Tariff Act of 1930, as amended, the failure of the Secretary of the Treasury to assess dumping duties upon the importation from Japan of portable electric typewriters. It has moved under Rule 1.1(b) of the rules of this court for a determination whether this court has subject matter jurisdiction over this action.[1]

Rule 1.1(b) provides that "[w]here, in any proceeding or in any instance, there is no applicable rule of procedure, the judge or judges, before whom the action is pending, may prescribe the same." Although Rule 4.7(b)(2) provides defendants with the defense of lack of subject matter jurisdiction, there is no equivalent procedure by which *plaintiffs* may contest subject matter jurisdiction.[2] SCM has moved under Rule 1.1(b) because, while invoking the court's jurisdiction by bringing this action, it nevertheless deems it necessary to contest the jurisdiction of the court. Even though not specifically provided for in the rules of this court, SCM's motion will nonetheless be entertained and considered. *See Rubberset Co.* v. *United States*, 68 Cust. Ct. 370, C.R.D. 72–9, 342 F. Supp. 749 (1972). Since, by this motion, SCM contests the jurisdiction of the court, the motion will be treated as a motion to dismiss for lack of subject matter jurisdiction.

A brief history of this litigation, and the statutory scheme under which it arose, is necessary to understand the nature and purpose of plaintiff's motion.

This case arises under the Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.* (1970 & Supp. V 1975) ("Antidumping Act"), which was enacted to prevent actual threatened injury to a domestic industry resulting from sales of imported merchandise in the United States at prices lower than in the country of origin. *J.C. Penney Co.* v. *United States Department of Treasury*, 319 F. Supp. 1023, 1024 (S.D. N.Y. 1970), *aff'd*, 439 F. 2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Timken Co.* v. *Simon*, 539 F. 2d 221 (D.C. Cir. 1976). An affected American manufacturer, producer or wholesaler has the right to file a complaint with the Secretary of the Treasury ("Secretary") alleging that a class of foreign merchandise is being "dumped" in the United States. 19 U.S.C. § 1516 (Supp. V 1975). The Secretary is then required to determine whether the foreign

[1] Since the federal courts have only that jurisdiction conferred by the Constitution or Congress, it is fundamental that any party, even one who originally asserted jurisdiction, can protest the lack of subject matter jurisdiction. *See American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S. Ct. 534 (1951); *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U.S. 379, 382, 4 S. Ct. 510 (1884); *Resnik* v. *LaPaz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961); 1 MOORE'S FEDERAL PRACTICE ¶0.60[4] (1977).

[2] The Federal Rules of Civil Procedure provide that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h)(3).

merchandise is actually being sold at a lower price in this country than in the home market, i.e., whether the sales are at less than fair value (LTFV). Whenever the Secretary finds sales at LTFV, he advises the United States International Trade Commission ("ITC"), which has three months tc determine "whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." If the ITC makes an affirmative injury determinaion, the Secretary must publish a notice of his and the ITC's determinations in the Federal Register. This publication constitutes the "dumping finding." The finding must include a description of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of customs officers. 19 U.S.C. § 160(a).

When the "dumping finding" has been published, all unappraised merchandise described in the finding, entered or withdrawn from warehouse for consumption, not more than 120 days before the question was presented to the Secretary, is subject to special dumping duties. The amount of the dumping duties is the difference between the value of the merchandise in the foreign market, and the purchase or exporter's sales price, i.e., the "dumping margin." 19 U.S.C. § 161(a). Dumping duties will not necessarily be assessed merely because the imported merchandise has been the subject of a dumping finding. Customs officials will assess dumping duties on an entry by entry basis, and only if they find a "dumping margin."

If the Secretary finds no LTFV sales, or if the ITC makes a negative injury determination, no dumping finding can be published and no dumping duties can be assessed. For a brief summary of the provisions of the Antidumping Act, see *SCM Corporation* v. *United States* (*Brother International Corporation, Party-in-Interest*), 79 Cust. Ct. 163, C.R.D. 77–6, 435 F. Supp. 1224 (1977), which denied plaintiff's motion for assignment of this action to a three-judge panel.

Under the Antidumping Act, dumping duties can be assessed only against *unappraised* merchandise. Congress, therefore, provided the provisional remedy known as "withholding of appraisement" to prevent importations during the pendency of the dumping investigation from being appraised by customs, and thus escaping subsequent imposition of dumping duties. Whenever the Secretary has reason to believe or suspect that a class of merchandise, as to which a finding has not been made public, is being sold at LTFV, i.e., being "dumped," he shall publish in the Federal Register what is called a withholding

notice. An appraisement is withheld until further order, or until a dumping finding has been published. 19 U.S.C. §160(b).

Pursuant to the Antidumping Act, SCM filed a complaint with the Secretary on February 14, 1974, alleging that portable electric typewriters from Japan were being "dumped" in the United States. Notice of pendency of a dumping investigation was published on March 20, 1974. Notice providing for withholding of appraisement followed on December 20, 1974. On March 20, 1975, Assistant Secretary of the Treasury Macdonald published a notice that sales of portable electric typewriters from Japan were being or were likely to be made at LTFV. 40 Fed. Reg. 12685 (1975). The ITC, advised of the Secretary's determination, held hearings in May of 1975, and on June 19, 1975 by a 3–2 vote, one Commissioner abstaining, rendered a negative determination of injury. The negative injury determination was published on June 26, 1975. 40 Fed. Reg. 27079 (1975). As a result of the negative injury determination by the ITC, the Secretary of the Treasury had no authority to publish a dumping finding or to assess dumping duties. Accordingly, he authorized the appraisement of the typewriters which were subject to withholding of appraisement pending the outcome of the dumping investigation.

SCM sought to contest the negative injury determination of the ITC. It commenced an action in the United States District Court for the District of Columbia seeking to set aside the negative injury determination of the ITC, and requested preliminary injunctive relief. *SCM Corporation* v. *United States International Trade Commission et al.*, 404 F. Supp. 124 (D.D.C. 1975). The jurisdictional basis for the action was 28 U.S.C. § 1340 (1970), which provides that "[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court." The jurisdiction of the United States Customs Court over actions by American manufacturers is found in 28 U.S.C. § 1582(b) (1970), which provides that "[t]he Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended." [3]

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[3] Section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (Supp. V 1975), reads as follows:

"(a) The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as 'countervailing duties'), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as 'antidumping duties'), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such

(Continued)

These statutes make it clear that if a civil action is within the exclusive jurisdiction of the United States Customs Court, it cannot be brought in the district courts. *E.g.*, *Consumers Union of United*

(Continued)

manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed.

(b) If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or antidumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

(c) If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or *failure to assess countervailing duties or antidumping duties upon, such merchandise* in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated. [Emphasis added.]

(d) Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

(e) Notwithstanding the filing of an action pursuant to section 2632 of Title 28, merchandise of the character covered by the published decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

(f) The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

(g) If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition

States, Inc. v. *Committee for the Implementation of Textile Agreements*, 561 F. 2d 872 (D.C. Cir. 1977), *cert denied*, No. 77–785 (March 20, 1978); *Fritz* v. *United States*, 535 F. 2d 1192 (9th Cir. 1976). Since the defendants in the district court maintained that the United States Customs Court had jurisdiction under the provisions of section 516, it moved to dismiss SCM's action for lack of subject matter jurisdiction. The district court held that since SCM could bring its action pursuant to section 516, it was within the exclusive jurisdiction of the United States Customs Court. In this decision, the district court also stated that the amendments to section 516 "provided in the Trade Act of 1974 reinforce the conclusion that Congress did not mean to deprive the Customs Court of its exclusive jurisdiction over customs matters." *SCM Corporation*, 404 F. Supp at 130. Accordingly, the district court granted defendant's motion and dismissed the action. *Id.* at 132.

On appeal, the United States Court of Appeals for the District of Columbia Circuit expressed doubt on the jurisdictional question presented and stated:

> "SCM has raised what are far from frivolous doubts concerning its ability to obtain review in the Customs Court pursuant to section 516(c). On the other hand, [the defendants] have urged upon us what appear to be quite possible constructions of the applicable statutes and legislative history." *SCM Corporation* v. *United States International Trade Commission et al.*, 549 F. 2d 812, 821 (D.C. Cir. 1977).

Hence, the court of appeals reversed the judgment dismissing SCM's action for lack of subject matter jurisdiction, and remanded the case to the district court. The remand contained the instruction that the district court retain jurisdiction until SCM had brought an action in the United States Customs Court to enable the Customs Court to determine whether it had jurisdiction to review a negative injury determination of the ITC in an American manufacturer's action brought under section 516.

Subsequently, SCM commenced an action in this court pursuant to section 516, and made the present motion to determine the court's subject matter jurisdiction. As indicated at the outset, the motion will be treated as a motion to dismiss for lack of subject matter jurisdiction. Thus, the question presented is whether under section 516 this court has jurisdiction to review a negative injury determination of the ITC in an action brought by an American manufacturer.

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is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

(h) Regulations shall be prescribed by the Secretary to implement the procedures required under this section. (As amended Jan. 3, 1975, Pub. L. 93–618, title III, §§ 321(f)(1), 331(b), 88 Stat. 2048, 2052.)"

There is no doubt that "agency action" is judicially reviewable, whether it is deemed affirmative or negative. *See City of Chicago* v. *United States*, 396 U.S. 162, 166–67, 90 S. Ct. 309 (1969); *Dunlop, Secretary of Labor* v. *Bachowski*, 421 U.S. 560, 566, 95 S. Ct. 1851 (1975); *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961) and authorities cited. The issue, therefore, is not whether judicial review is available, but rather, the appropriate forum in which it may be sought.

SCM points out that there is no specific statutory provision that expressly grants jurisdiction to this court to review a negative injury determination by the ITC in an American manufacturer's action. It claims that there is no jurisdiction in this court since section 516(c) only provides for review to contest the Secretary's failure to assess antidumping duties.

SCM states that section 516(d) *expressly* provides for jurisdiction in this court to review *LTFV* determinations by the Secretary. Because this review was *expressly* provided for, while no express provision was made to review injury determinations by the ITC, SCM claims that "failure to assess antidumping duties" cannot include review of an ITC injury determination. According to SCM, if "failure to assess antidumping duties" were to be read to include injury determinations by the ITC, it would also include review of the Secretary's LTFV determinations, and that interpretation would make the specific provision for review of LTFV determinations unnecessary.

SCM believes that the legislative history supports its view that Congress never intended section 516 to provide review of negative injury determinations of the ITC. It also points to several prior judicial decisions which recognize that if there is no adequate remedy in this court, jurisdiction will be exercised by the district courts. SCM asserts that this principle is applicable here since this court is unable to provide an adequate remedy.

Defendant[4] maintains that SCM's demand is overly exacting in its requirement or expectation that the statute explicitly recite that negative injury determinations by the ITC are reviewable under section 516. It indicates that no statute *precludes* review in this court. According to the defendant, the "failure to assess" language of section 516(c) includes all preliminary determinations which enter into the

[4] Under 19 U.S.C. §1516(f) (note 3 *supra*), the consignee or his agent has the right to appear and be heard as a party in interest in an action brought by an American manufacturer pursuant to section 516. In the present action, Brother International Corporation has exercised this right to appear and be heard as a party in interest. Because the arguments of the defendant and the party in interest are substantially similar, the term "defendant" includes the arguments of both, unless stated otherwise.

Secretary's failure to assess dumping duties. The defendant emphasizes that only this interpretation fully supports and fosters the well-known national policy of providing for a uniform scheme of customs law through exclusive jurisdiction in this court. It also maintains that SCM is in error in asserting that this court cannot provide an adequate remedy.

In determining whether section 516 provides for review of a negative injury determination of the ITC, the court must first examine the actual language of the statute. Section 516 provides American manufacturers, producers and wholesalers with the procedure to contest the appraised value and classification of merchandise, the applicable rate of duty, and the failure to assess countervailing or antidumping duties.

If an American manufacturer believes that antidumping duties should be assessed, section 516(a) authorizes the manufacturer to file a petition with the Secretary setting forth a description of the merchandise, the duty it feels should properly be assessed, and the reasons for its belief that antidumping duties should be assessed. 19 U.S.C. § 1516(a). If the Secretary agrees with the American manufacturer, he complies with the procedure prescribed in the Antidumping Act. 19 U.S.C. § 1516(b).

If, however, the Secretary determines that the appraisement or duty assessment is correct, or that no antidumping duties should be assessed, section 516(c) expressly authorizes and prescribes the procedures for the American manufacturer to challenge the Secretary's decision. The Secretary must give notice of the first liquidation of the merchandise in question at a port or ports specified by the American manufacturer. Section 516(c) also expressly authorizes the manufacturer to contest the "failure to assess . . . antidumping duties upon, such merchandise in the liquidation of one such entry at such port [as designated by the American manufacturer]." 19 U.S.C. § 1516(c).

If the Secretary, in the course of his antidumping investigation, makes a determination of no sales at LTFV, section 516(d) expressly permits an American manufacturer directly to contest that *particular* determination without following the requirements of section 516(c).

SCM suggests that by enacting 516(d), Congress indicated it could provide explicitly for review of antidumping determinations. Hence, by failing to enact a specific provision for review of ITC determinations parallel to section 516(d), SCM asserts that Congress intended to preclude review. The court does not agree that Congress, by its failure explicitly to provide for review of ITC injury determinations in section 516(d), intended to preclude judicial review. The question presented pertains to the intent of Congress as gleaned from the entire statutory scheme of section 516.

The language of section 516(c) that permits an American manufacturer to contest "the failure to assess . . . antidumping duties" contains no limitations, and is sufficient to include a challenge to the preliminary determinations that go into a decision to assess, or not to assess, dumping duties. Admittedly, there is no language in section 516, or elsewhere that would preclude review of ITC determinations under section 516. SCM nonetheless asserts that the purpose of its action is not the assessment of dumping duties, but the cessation of injurious "dumping." Therefore, it asserts that, under the provisions of section 516(c), it cannot obtain review of the failure to assess dumping duties.

To achieve its objective, SCM claims that dumping duties need not be assessed. It feels that the publication of a dumping finding, which would authorize the imposition of dumping duties when a margin of dumping exists, would remove any incentive to "dump." The mere publication of a dumping finding, however, cannot provide the relief SCM seeks. Only the imposition of dumping duties, if warranted, will end dumping. No matter how characterized or phrased by SCM, what is ultimately at issue is the appraised value of the imported merchandise.

The present version of section 516 was enacted as part of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2052 (1975) (now codified as 19 U.S.C. § 1516). Under the prior scheme of section 516, an American manufacturer was afforded the right to contest in this court valuation determinations by the Secretary. Tariff Act of 1930, ch. 497, Title IV, § 516, 46 Stat. 735 (1930). Under that provision, it was held that an American manufacturer could contest the Secretary's determination of no sales at LTFV in an antidumping investigation. *North American Cement Corp.* v. *Anderson*, 284 F. 2d 591 (D.C. Cir. 1960). In another case, however, a decision of the Court of Customs and Patent Appeals questioned the correctness of this determination. In *Hammond Lead Products, Inc.* v. *United States*, 63 Cust. Ct. 316, C.D. 3915 (1969), this court had held that, under section 516, it had jurisdiction to review a negative countervailing duty determination by the Secretary. The Court of Customs and Patent Appeals, however, reversed and held that a countervailing duty was a penalty and therefore not within the scope of section 516. *United States* v. *Hammond Lead Products, Inc.* 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971), *cert. denied*, 404 U.S. 1005 (1971).

The 1974 Trade Act amendments were designed to nullify the holding of the *Hammond Lead Products* case, and specifically authorized review of negative countervailing duty determinations within section 516. H.R. Rep. No. 93-571, 93d Cong., 1st Sess. 76 (1973). By pro-

viding for judicial review, Congress intended "to assure effective protection under the countervailing duty laws to American producers." S. Rep. No. 93–1298, 93d Cong., 2d Sess. 185 (1974). As part of the wide-ranging reforms effected by the Trade Act of 1974, Congress amended the Antidumping Act and the antidumping provisions of section 516. The House did not include a specific provision for judicial review of negative antidumping determinations in its version of the bill because no judicial decision seemed to have made it necessary. Indeed, as indicated by the following statements from the House Report, it felt that judicial review under section 516 was already available to an American manufacturer:

> "It will be noted in the following section that section 516 of the Tariff Act of 1930 is amended to specifically permit judicial review of negative countervailing duty determinations. The committee has been informed by letter from the Secretary of the Treasury that domestic producers do have the right of judicial review in antidumping cases. *The committee wishes to make it clear that the absence of amendments to section 516 with respect to antidumping cases should not be considered to mean that negative antidumping findings are not subject to review.* The committee is in agreement with the letter." H.R. Rep. No. 93–571, at 73 (Emphasis added.)

The letter referred to in the House Report based its conclusion that judicial review of negative antidumping determinations was already available in the holding of the *North American Cement* decision. In the opinion of the Secretary of the Treasury, *Hammond Lead Products* did nothing to cast doubt upon the reviewability of negative antidumping determinations since that decision was predicated on the conclusion that *countervailing duties* were penal in nature, and the Secretary believed that dumping duties were not penal but ordinary duties.[5]

As may be gleaned from the following committee report, the Senate Finance Committee, although with some doubt, generally agreed with the opinion expressed in the House Report:

> "*Equal Judicial Review Rights for Domestic Producers.*— . . . The House report makes references to an informal opinion of the Treasury Department which asserts that existing law provides for judicial review of negative antidumping decisions on the part of the U.S. manufacturers, producers, or wholesalers. *The Committee generally agrees with this opinion.* However, it is the view of the Committee that since some question remains as to the ability of American manufacturers, producers, and wholesalers

[5] The letter is contained in full in the opinion of the court of appeals in *SCM Corporation* v. *United States International Trade Commission et al.*, 549 F. 2d 812, 816, n. 9 (D.C. Cir. 1977). *See* plaintiff's exhibit 7.

> to obtain judicial review of negative antidumping determinations under section 516 of the Tariff Act of 1930, the law ought to be explicit on this point. The Committee believes it essential that domestic producers have the right to judicial review of negative price discrimination (LTFV) determinations, just as foreign producers and importers have the right to obtain judical review of positive price discrimination (LTFV) determinations.
>
> The Committee, therefore, added [a] new subsection . . . to provide *explicitly* for judicial review of negative antidumping determinations made by the Secretary of the Treasury. . . ." S. Rep. No. 93–1298, 93d Cong., 2d Sess. 178 *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7314–15. (Emphasis added in part.)

The new subsection added by the Senate is embodied in section 516(d), and, in antidumping cases, provides for judicial review of determinations by the Secretary that there have been no sales at LTFV. It does not explicitly provide for review of negative injury determinations by the ITC, or failure of the Secretary to assess dumping duties because no margin of dumping was found.

When the bill reached the full Senate, several amendments were made before passage. The present language of section 516(c), providing for review of the Secretary's failure to assess antidumping duties, was added by Amendment No. 2051. The following statement by Senator Long, who introduced this amendment, is particularly pertinent: "Mr. President, *this amendment permits a manufacturer to review on an identical basis* negative countervailing duty and antidumping determinations of the Secretary of the Treasury. It is more or less a *conforming amendment* to carry out the intent of the bill. [Emphasis added]." 120 CONG. REC. 39839 (1974). *See* H.R. 10710, 93d Cong., 2d Sess. § 331(b) (Amendment Nos. 364–67) (Dec. 13, 1974) (Approved Jan. 3, 1975).

Surely, there is no indication that Congress intended to *preclude* review of ITC injury determinations under section 516. The Senate Report basically agreed with the opinion of the House that the existing law provided for judicial review of negative antidumping determinations. The Finance Committee, however, considered it essential that American manufacturers have the right to judicial review of negative LTFV determinations by the Secretary, and thus drafted what is now section 516(d) explicitly to provide for judicial review. It made no provision for judicial review of *other* aspects of negative antidumping determinations. S. Rep. No. 93–1298. Amendment No. 2051, which added review of failure to assess antidumping duties to section 516(c), was added to *conform* the review of antidumping duties with the provisions for review of countervailing duties. This legislative

intent is shown not only by the remarks of Senator Long, but also by the classification given the amendment by the Conference Committee. The House agreed to the amendment without comment as a conforming amendment. Conf. Rep. No. 93–1644, 93d Cong., 2d Sess. 1, 21, *joint explanatory statement of the committee of conference, reprinted in* [1974] U. S. CODE CONG. & AD. NEWS 7367.

Before countervailing duties may be assessed, the Secretary must determine whether a bounty or grant has been bestowed on the imported merchandise by a foreign government. Countervailing duty determinations are usually made by the Secretary without assistance from the ITC. However, where the merchandise is normally duty-free, an affirmative injury determination by the ITC is required before the Secretary may assess a countervailing duty. 19 U.S.C. §1303(b) (Supp. V 1975). In this instance, the requirements to impose countervailing duties are closely parallel to those required to impose dumping duties. It has been observed that the countervailing duty law and the antidumping statute are "opposite sides of the same coin." King, *Countervailing Duties—An Old Remedy With New Appeal*, 24 BUS. LAW. 1179, 1181 (1969).

The language of section 516(c) is identical for countervailing duty and antidumping duty cases. If an American manufacturer is dissatisfied with the decision of the Secretary, it may contest the "failure to assess countervailing duties or antidumping duties upon, such merchandise . . . ." 19 U.S.C. § 1516(c).

It is clear that Congress intended to extend review under section 516(c) to encompass *all* issues embodied in the failure to assess countervailing duties. The House Report expressly stated that the amendment to section 516(c) would "provide for judicial review of negative countervailing duty determinations by the Secretary of the Treasury." H.R. Rep. No. 93–571, at 76. SCM, however, argues that the phrase "determinations by the Secretary," as used in the House Report, and by Senator Long in introducing Amendment No. 2051, shows a congressional intent to limit review under section 516, in both antidumping and countervailing duty cases, to those determinations actually made by the Secretary. SCM contends that this phrase shows that Congress did not intend review under section 516 to encompass decisions underlying determinations made by the Secretary. The House Report, however, used the phrase in the very section where it discussed the requirement that an injury determination be made by the ITC before the Secretary could assess countervailing duties on otherwise nondutiable merchandise. Therefore, the phrase "determinations by the Secretary," as used in the legislative history, refers to *any* factor or finding that would enter into the failure of the

Secretary to assess countervailing or antidumping duties. It was not intended to be limited solely to determinations actually made by the Secretary.

Section 516(c) does, therefore, provide for review of a negative injury determination by the ITC, when necessary, in a countervailing duty action brought by an American manufacturer. Compliance with the stated intent of Congress, to provide review of nagative countervailing duty determinations and negative antidumping duty determinations "*on an identical basis*" requires that section 516(c) be interpreted to afford review of all issues in antidumping cases. This should include review of negative injury determinations of the ITC, as well as all issues in countervailing duty cases. Any other interpretation would do violence to the stated intention to attain in dumping cases "conformity" and "identical" treatment with countervailing duty cases.

Section 516(d) expressely provides for judicial review of a determination by the Secretary that a bounty or grant has not been paid or bestowed in countervailing duty cases (19 U.S.C. § 1516(d)(2)),[6] as well as review of the Secretary's determination that there have been no LTFV sales in antidumping cases. 19 U.S.C. § 1516(d)(1). SCM claims that section 516(d) indicates an intent to preclude review of ITC determinations under section 516(c) on the basis that Congress did not consider a challenge of the Secretary's negative LTFV determination to be a challenge of the decision not to assess dumping duties. The court does not agree with plaintiff's contention because the expressed intention of Congress was to authorize review of negative antidumping determinations and negative countervailing duty determinations on an identical basis. 120 CONG. REC. 39839 (1974) (remarks of Sen. Long). The House Report manifests an intent that section 516(c) should provide review of *all* issues embodied in the failure to assess countervailing duties. The provisions of section 516(d) merely provide a more expeditious form of review of one specific issue in antidumping cases, and for one specific issue in countervailing duty cases. Nowhere is there any indication that this additional section was intended to limit the broad general language of section 516(c). *See* S. Rep. No. 93–1298 and Conf. Rep. No. 93–1644, at 44.

The conclusion that Congress intended section 516 to include review of a negative injury determination by the ITC in an action brought by an American manufacturer is fully supported by the expressed intention of the amendments to the Trade Act of 1974. Senator Long stated that the purpose of Amendment No. 2051, which added antidumping review to section 516, was "to carry out the intent of the bill." 120

[6] This provision was added to subsection (d) as part of Amendment No. 2051. 120 CONG. REC. 39839 (1974)

CONG. REC. 39839 (1974). It is clear that one of the purposes of trade act amendments was to provide American manufacturers with judicial review equal to that available to importers which entitled them to contest the actual assessment of countervailing or antidumping duties. *See* H.R. Rep. No. 93–571, at 76; S. Rep. No. 93–1298. This court and the Court of Customs and Patent Appeals have regularly exercised jurisdiction in actions brought by American importers to contest affirmative injury determinations by the ITC.[7] *See, e.g., Imbert Imports Inc.* v. *United States*, 60 CCPA 123, C.A.D. 1094, 475 F. 2d 1189 (1973); *City Lumber Co.* v. *United States*, 59 CCPA 89, C.A.D. 1045, 457 F. 2d 991 (1972); and *Ellis K. Orlowitz Co.* v. *United States*, 50 CCPA 36, C.A.D. 816 (1963).

The intent to provide judicial review of these questions, "equally" to American manufacturers and importers, is in harmony with the well recognized national policy that this court was established by Congress to provide a complete system of justice in the administration of customs law. It is also generally acknowledged that "questions involving the validity of official action in the imposition and collection of duties are properly cognizable before [the Customs Court] to the exclusion of other courts." *David L. Moss Co.* v. *United States*, 26 CCPA 381, 383, C.A.D. 45, 103 F. 2d 395 (1939).

Many cases may be cited to show that the courts have judicially noticed the congressional intention that civil litigation pertaining to customs matters should be conducted exclusively in the Customs Court. For example, the United States Court of Appeals for the Ninth Circuit, referring to the exclusive jurisdiction of the Customs Court, recently stated:

> "Even when other, broadly-worded statutes seem to confer concurrent jurisdiction on the district courts, the exclusivity of Customs Court jurisdiction reflects a policy of paramount importance which overrides the literal effect of such statutes . . .." *Fritz* v. *United States*, 535 F. 2d 1192, 1195 (9th Cir. 1976).

See also. David L. Moss Co. v. *United States, supra; J. C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (2d Cir. 1939); *Cottman* v. *Dailey*, 94 F. 2d 85 (4th Cir. 1938).

In the *North American Cement* case, 284 F. 2d 591 (1960), the United States Court of Appeals for the District of Columbia Circuit also acknowledged the exclusive jurisdiction of the Customs Court.

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[7] The ITC, formerly known as the United States Tariff Commission, was established by the Tariff Act of 1930, ch. 497, § 330, 46 Stat. 696 (1930). Its name was changed to the United States International Trade Commission by the Trade Act of 1974, Pub. L. No. 93-618, § 171, 88 Stat. 2009 (1975).

In affirming the dismissal by the district court of the American manufacturer's complaint for lack of subject matter jurisdiction, the circuit court reviewed several of its previous holdings on this question:

> "In *Morgantown Glassware Guild* v. *Humphrey*, we read 28 U.S.C. § 1583 [now 1582] as providing without limitation that ' "The Customs Court shall have exclusive jurisdiction to review on protest the * * * rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * *." ' 98 U.S. App. D.C. 375, 376, 236 F. 2d 670, 671 [1956]. In *Boston Wool Trade Ass'n* v. *Snyder*, we said: 'It is clear that the controversy concerns the duty to be imposed upon certain imports. As such, it is within the exclusive jurisdiction of the Court of Customs and Patent Appeals.' 82 U.S. App. D.C. 144, 145, 161 F. 2d 648, 649 [1947]." 284 F. 2d at 592.

The same national policy led to the establishment of the Court of Customs Appeals, the predecessor of the present United States Court of Customs and Patent Appeals. *see, e.g.*, 44 CONG. REC. 4189, 4190, 4195–96, 4199, 4201–02, 4208, 4213–14, 4215, 4697 (1909).

Congress established the Customs Court to provide uniformity and consistency in the interpretation and application of the customs laws. *J. C. Penney Co.*, 439 F. 2d at 65–66. By the recent amendments of the Trade Act of 1974, Congress further demonstrated its intention that the Customs Court should provide an exclusive and uniform interpretation of customs laws by superseding the *Hammond Lead Products* case, which had held that negative countervailing duty determinations were not reviewable in this court. *See* H.R. Rep. No. 93–571, at 76.

Questions of uniform national application must be resolved by an interpretation of the governing statute that effectuates the intended purpose of the Congress. *See NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 64 S. Ct. 851 (1944); *Rogers* v. *Missouri Pacific Ry.*, 352 U.S. 500, 77 S. Ct. 443 (1957); *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912 (1957). In the *Hearst Publications* case, it was contended that newsboys were not required to bargain because they were not within the meaning of "employees" under the National Labor Relations Act. The Supreme Court held that the term "employees," as used under that Act, was to be interpreted in accordance with the intended purpose of the statute, and not by resort to the common law relation of "master-servant." The national purpose of the Act could only be achieved by a broadened definition of the word "employees" since, clearly, Congress did not legislate "solutions only partially effective." 322 U.S. at 120–32. Similarly, the language of section 516(c) must be interpreted to effectuate the congressional intent that the customs laws of the nation be interpreted and applied with uniformity and consistency.

This intent, to make the United States Customs Court the exclusive tribunal for the interpretation and application of the customs laws, is particularly significant because it finds its genesis not only in congressional enactments, but also in the constitutional mandate that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, §8. To accept SCM's contention that this court is without jurisdiction to review injury determinations by the ITC under section 516 does violence to the constitutional requirement of uniformity, and the legislative history surrounding the recent amendments to section 516.

It is not disputed that an importer can seek review in this court of the assessment of antidumping duties, including all determinations that underlie the assessment. An importer can challenge the Secretary's finding of sales at LTFV, the ITC's affirmative determination of injury, the determination by the Customs Service that the merchandise is of the class or kind subject to dumping duties, and that a dumping margin exists. It is also not disputed that an American manufactrer can seek review in this court of the Secretary's determination of no sales at LTFV, the determination by the Customs Service that the merchandise is not of the class or kind subject to dumping duties, and the Customs Service's determination that no dumping margin exists. In short, it is undisputed that all the issues that can be raised by an importer in an antidumping action in this court can also be raised in a similar action by an American manufacturer, with the sole exception of negative injury determinations by the ITC.

SCM seeks a determination whether jurisdiction over this particular antidumping question is in this court or in the district courts. To agree with the contention that jurisdiction exists in the district courts is to permit potentially conflicting determinations of the same issues by the various district courts. It is precisely this possibility of differing interpretations that Congress sought to avoid by establishing the United States Customs Court.

It is clear that this court has jurisdiction, and may apply its expertise in customs and tariff matters to ITC determinations in actions brought by importers. To be unable to utilize this same expertise in the same type of questions only because the action is brought by an American manufacturer would be unreasonable and anomalous. It is inconceivable that Congress could have intended such a result. Chief Justice Marshall, writing of the "well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole," added that: "It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided,

unless the meaning of the legislature be plain; in which case it must be obeyed." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). "It has been called the golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result." 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 45.12, at 37 (4th ed. 1973). *See Commissioner* v. *Brown*, 380 U.S. 563 (1965); *Lange* v. *United States*, 443 F. 2d 720 (D.C. Cir. 1971; *Cohn & Rosenberger* v. *United States*, 4 CCPA 378, T.D. 33536 (1913).

The whole purpose of the legislative effort underlying the 1974 Trade Act amendments was to give identity of rights to importers and American manufacturers. Any other interpretation would attribute to Congress the permitting of an intolerable anomaly, vitiating its expressed intention of equality for both classes. As stated in the dissenting appellate opinion of *Hammond Lead Products*, which now represents the law:

> "If an importer may protest the decision of the Secretary of the Treasury finding a bounty or grant, why shouldn't an American manufacturer be permitted to protest the decision of the Secretary of the Treasury finding no bounty or grant? . . . They are . . . protesting a decision of the Secretary of the Treasury as they are clearly permitted to do under either section 514 or 516, depending on whether it is a protest by an importer or by an American manufacturer." 58 CCPA at 144.

This fortifies the concept that what is involved in antidumping and countervailing cases, whether the complaint is that of an importer or an American manufacturer, is the classification and/or the rate of duty of imported merchandise.

There is no doubt that it was the intent of Congress to provide judicial review to American manufacturers under section 516. The interpretation that judicial review of negative injury determinations by the ITC is available in the United States Customs Court under section 516 fulfills the intent of Congress, and effectuates the national policy of fostering expertise and uniformity in the interpretation and application of the customs laws.

SCM nonetheless contends that even though the policy of uniformity in the interpretation and application of the customs laws requires exclusive jurisdiction to be vested in the United States Customs Court, this action nevertheless comes within the recognized judicial exception that if adequate relief cannot be obtained in this court, jurisdiction lies in the district courts. *J.C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d 63 (2d Cir. 1971), *cert. denied* 404, U.S. 869 (1971); *United States* v. *Hammond Lead Products, Inc.*,

58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024 (1971); *Timken Co.* v. *Simon*, 539 F. 2d 221 (D.C. Cir. 1976).

Citing the *Timken* case, SCM argues that if it proceeded under section 516, it could not obtain an adequate remedy. Since section 516(c) provides for the challenge to the nonassessment of dumping duties on only one entry, SCM claims that there is no assurance that by following section 516(c) it can obtain review of the ITC's negative injury determination. It suggests that by providing review procedures in section 516(d), for the review of the Secretary's LTFV determinations that are different from the provisions of section 516 (c), Congress indicated that it would be too burdensome to follow section 516(c) procedures in challenging negative injury determinations.

In the *Timken Co.* case, the court indicated that section 516(c)—

> "is designed to enable American manufacturers to challenge substantive decisions by the Secretary with respect to the need for or the amount of antidumping duties. The section is structured to enable the petitioning maufacturer to challenge one entry per port, and *to use that entry as a vehicle to obtain Customs Court review of the merits of the Secretary's determination.*" (*Emphasis added.*) *Timken Co.*, 539 F. 2d at 225–26.

The judicial exception to the exclusive jurisdiction of the Customs Court, which vests jurisdiction with the district courts when this court cannot grant an adequate remedy, finds expression in the *J. C. Penney Co.* case. In that case, an American importer sought declaratory and injunctive relief to prevent the Treasury Department from conducting an investigation under the Antidumping Act to determine whether there were LTFV sales of the importer's products. The court observed that—

> "[i]t is further urged that even acknowledging that generally exclusive jurisdiction over constitutional issues is vested in the Customs Court, there nevertheless exists a recognized judicial exception to this statutory rule when no adequate relief may be obtained in that court. We do not dispute the existence of such an exception. See, e.g., *Waite* v. *Macy*, 246 U.S. 606, 38 S. Ct. 395, 62 L. Ed. 892 (1918)." *J. C. Penney Co.* v. *United States Treasury Department*, 439 F. 2d at 68.

Although recognizing the existence of the exception to the "generally exclusive jurisdiction" of the Customs Court, the court held that the exception was inapplicable. In effectuating the intent of Congress, and the "broad national policy" which prompted the grant of exclusive jurisdiction to the Customs Court, the court noted that the "proper administration of the customs laws requires a complete, integral, smooth-functioning system of customs law justice." 439 F. 2d at 66. Although the Customs Court lacked the equitable power to grant the

relief plaintiff sought, the remedy that the Customs Court could grant was nevertheless deemed adequate. The court stated:

> "Thus the only remedy available to Penney [in the Customs Court] is the obtaining of refunds of special dumping duties which may have been improperly assessed and paid. Though it may be true that the ordering of a hearing would be a more desirable from of relief from Penney's point of view than the obtaining of refunds, the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate. We conclude that ther is, in fact, an adequate remedy available to Penney in the Customs Court." 439 F. 2d at 68.

In *Waite* v. *Macy*, 246 U.S. 606 (1918), cited by the court in the *J.C. Penney Co.* case, the issue was not whether the plaintiff could obtain an adequate remedy within the statutory jurisdiction of the Secretary of the Treasury and the Board of General Appraisers. Rather, the question presented was whether the Secretary of the Treasury and the board had exceeded their jurisdiction by applying criteria not enumerated in the statute. In that case, pursuant to a regulation of the Secretary of the Treasury, the board had excluded certain imported tea on the ground that it contained added coloring. The pertinent statute restricted the board's power to determinations on the purity, quality or fitness for consumption. The Supreme Court held that the board exceeded its statutory jurisdiction in applying criteria not spelled out in the statute. Mr. Justice Holmes, writing for the Court, stated:

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption." 246 U.S. at 608–09.

The Court of Customs and Patent Appeals has acknowledged that the district courts may have jurisdiction over customs cases where the plaintiff has no remedy in the Customs Court. In the *Hammond Lead Products* case, an American manufacturer claimed that section 516, prior to the Trade Act of 1974 amendments, provided for judicial review in the Customs Court of the Secretary's failure to assess countervailing duties. Although the Court of Customs and Patent Appeals held that section 516 did not confer jurisdiction on the Customs Court to review negative countervailing duty determinations of the Secretary in actions brought by American manufacturers, the following statements of the appellate court are nevertheless pertinent to the question of an available remedy in the Customs Court:

> "The Second Circuit, in *J. C. Penney Company Inc.* v. *United States* [citation omitted], has considered the new statute and reaffirmed holdings under the old, that the regular Federal courts will not interfere in customs cases reviewable in the Customs Court, because an importer desires to tailor a remedy more satisfactory to him than the Customs Court affords. A case of an American Manufacturer having no remedy at all in the Customs Court is greatly different. . . . [I]t could be the regular [Federal] courts would take jurisdiction in cases outside [the scope of the Customs Court's jurisdiction]." *Hammond Lead Products, Inc.*, 58 CCPA at 140–41.

SCM cites *Timken Co.* v. *Simon*, 539 F. 2d 221 (D.C. Cir. 1976) in support of its contention that it does not have an adequate remedy through section 516. In the *Timken Co.* case, the plaintiff, an American manufacturer, pursuant to section 516, submitted a complaint that tapered roller bearings form Japan were being "dumped" in the United States. After investigating Timken's charges, the Secretary, on June 5, 1974, pursuant to 19 U.S.C. § 160(b), published a notice withholding appraisement, and on September 6, 1974, published a determination of LTFV sales. On January 23, 1975, the ITC rendered an affirmative injury determination. At this point the Secretary would normally publish a "dumping finding," and all unappraised tapered roller bearings from Japan entered, or withdrawn from warehouse, for consumption not more than 120 days before October 31, 1973 (the date the Secretary received Timken's complaint) would be subject to the imposition of dumping duties. The Secretary however, did not follow this course. Instead, he directed the customs officials to appraise the merchandise covered by the withholding notice, thus removing those entries from possible imposition of dumping duties.

The United States Court of Appeals for the District of Columbia Circuit affirmed a finding of jurisdiction in the district court on the ground that section 516 could not provide review of Timken's complaint that the Secretary acted beyond his authority in revoking the withholding of appraisement notice, and ordering appraisement of the merchandise prior to publication of a dumping finding. The court held that section 516 provided review of substantive decisions by the Secretary with respect to antidumping duties through the review of certain entries occurring *after* the date of the Secretary's adverse ruling. (*See* section 516(c), *supra* note 3.) The question presented by Timken's complaint was beyond the scope of section 516 because it concerned entries made before the date of the Secretary's adverse determination. The court, therefore, concluded that "[s]ince Timken has *no remedy*

pursuant to section 516 in the Customs Court, we decline to hold that the district court lacked jurisdiction over this action." *Timken Co.*, 539 F. 2d at 226, n. 7 (emphasis in original).

Thus, although the *J. C. Penney Co.* case recognized that the exception to the generally exclusive jurisdiction of the Customs Court vests jurisdiction in the district courts when this court cannot grant an adequate remedy, the court held that an adequate remedy was available in the Customs Court. The *Hammond Lead Products* and *Timken Co.* cases held that the Customs Court could grant *no remedy* because the statutory scope of its jurisdiction did not extend to the respective issues presented in those cases.

The United States Court of Appeals for the Second Circuit recently considered this jurisdictional question in a case that came within the exception to the exclusive jurisdiction of the Customs Court. In *Sneaker Circus, Inc., et al.* v. *Carter et al.*, 566 F. 2d 396 (2d Cir. 1977), the plaintiff importers sought to attack the validity of certain trade agreements which limited the quantity of footwear exported from the Republic of Korea and the Republic of China to the United States. No footwear could be exported to the United States unless the exporter obtained a visa from his government approving the exportation.

To obtain judicial review in the Customs Court, pursuant to section 514, Tariff Act of 1930, as amended, the plaintiffs must have protested the denial of entry of footwear exported from the Republic of China and the Republic of Korea by a specific administrative ruling made at a United States port of entry. Only when that particular protest had been denied in accordance with the provisions of section 515, Tariff Act of 1930, as amended, could the jurisdiction of the Customs Court be invoked. However, without obtaining a visa from the exporting country, it was doubtful whether the plaintiffs would ever be able to export footwear from the Republic of Korea and the Republic of China to test the denial of entry into the United States. The export visa could only be granted under the terms of the trade agreements which the plaintiffs were seeking to challenge. To attempt to export goods without a visa, and in violation of the export limits, subjected the foreign exporter to "heavy civil and criminal sanctions in the country of export." *Sneaker Circus, Inc., et al.*, 566 F. 2d at 399. Under these circumstances, the United States Court of Appeals concluded there was "every likelihood that the agreements will be effectively enforced abroad, with the result that no occasion for protest under section 514 will ever present itself, and no Customs Court jurisdiction . . . will arise." *Id.* Therefore, although section 514 *could* have afforded review in the Customs Court, it was *probable* that the jurisdictional prerequisites under section 514 would never be met, thus effectively precluding judicial review.

In the case at bar, none of the circumstances that would warrant the exercise of jurisdiction by the district courts is present. Unlike the *Hammond Lead Products* and *Timken Co.* cases, the issue raised by SCM's complaint, i.e., the correctness of the ITC's negative injury determination, is covered by the statutory scope of this court's jurisdiction under section 516(c). Unlike the plaintiffs in the *Sneaker Circus* case, SCM has already met the jurisdictional prerequisites of section 516(c). Thus, this court is in a position to grant an appropriate remedy to SCM if it should prevail on the merits.

In view of the foregoing, it is the determination of this court that it has jurisdiction over the subject matter of this action. Consequently, SCM's motion, which is treated as a motion to dismiss for lack of subject matter jurisdiction, is denied.

The court is aware that the issue presented upon this motion should be finally resolved as expeditiously as possible. Accordingly, pursuant to the provisions of 28 U.S.C. § 1541(b) and Rule 13.2 of the rules of this court, the court concludes that an immediate appeal from this order may materially advance the ultimate determination of the litigation.

Appeals to United States Court of Customs and Patent Appeals

APPEAL 78-10.—In the matter of N. C. Trading Co., Inc.—AMERICAN MANUFACTURER'S ACTION—RIGHT TO INTERVENE AS PARTY IN INTEREST. Appeal from order of December 14, 1977 (not published), rehearing denied February 28, 1978 (not published)—Airco, Inc. *v.* United States, Court No. 76-3-00643.

In this case, N. C. Trading Company, Inc., an importer-consignee of ferrochrome from South Africa, appeals from an order of the Customs Court entered December 14, 1977 (not published), denying its motion to intervene as a party in interest. N. C. Trading's motion for a rehearing of its motion or, in the alternative, certification by the Customs Court permitting the application for an interlocutory appeal pursuant to 28 U.S.C. § 1541(b) was denied in an order entered February 28, 1978 (not published). Plaintiff, Airco, Inc., an American manufacturer of ferrochrome, and defendant opposed the motions before the Customs Court.—A motion for a stay of proceedings in the Customs Court pending appeal was filed by N. C. Trading concurrently with the notice of appeal.

It is claimed that the Customs Court erred insofar as the effect of its order denying the motion to intervene resulted in the following findings and conclusions: (1) That N. C. Trading, a consignee of the merchandise that is the subject of a proceeding under section 516(d) of the Tariff Act of 1930, does not have a right to appear and be heard as a party in interest; and (2) that the constitutional rights of N. C. Trading are not infringed if N. C. Trading is denied the right to appear and be heard as a party in interest.

APPEAL 78-11.—United States *v.* Johnson & Co., Inc.—MAIRON ELECTROLYTIC IRON CATHODE PLATE OR FLAKE—ARTICLES OF IRON—CHEMICAL ELEMENTS IN ANY PHYSICAL FORM—ARTICLES NOT SPECIALLY PROVIDED FOR—TSUS. Appeal from C.D. 4737.

In this case "Mairon Electrolyic Iron Cathode Plate" or "Mairon Electrolytic Iron Flake," heretofore the subject of decision in C.D. 4650, was classified as articles of iron not coated or plated with precious metal and assessed at the duty rate of 13 or 15 percent ad valorem, depending upon the date of entry, under item 657.20, Tariff Schedules of the United States, as modified by T.D. 68-9. In C.D. 4650 the Customs Court held the merchandise properly classifiable, as claimed by plaintiff (appellee), as chemical elements in any physical form at the duty rate of 7 or 8 percent, depending upon the date of entry,

under item 415.50, as modified by T.D. 68–9. An alternative claim for classification of the merchandise under item 799.00, as modified by T.D. 68–9, as an article not provided for elsewhere in the schedules at the duty rate of 7 or 8 percent, depending upon the date of entry was not reached by the court in view of its disposition of the primary claim. Defendant (appellant) appealed from C.D. 4650, and the Court of Customs and Patent Appeals in C.A.D. 1196 reversed the Customs Court's determination with respect to the primary claim, holding that the merchandise was excluded from classification under schedule 4 of the TSUS (the chemicals schedule) per force of headnote 1(iii) of that schedule, and remanded the case to the Customs Court for a determination of the merits of any unadjudicated claimed classification Therefore, on remand (C.D. 4737), the court considered the merits of plaintiff's alternative claim under item 799.00, *supra*. The Customs Court concluded that "since the iron fragments at bar are unquestionably a primary form of iron which does not respond to the Tariff concept of *articles of iron*, and cannot, under the law of this case, be classified under the chemicals schedule, it follows that this merchandise is classifiable as alternatively claimed by the plaintiff under the residual provision in item 799.00 for articles not provided for elsewhere in these schedules, and the court so holds."

It is claimed that the Customs Court erred in finding and holding that the subject merchandise is properly classifiable under item 799.00 *supra;* and in not finding and holding that the merchandise was properly classified under item 657.20, *supra*.

International Trade Commission Notices

Investigations by the United States International Trade Commission

DEPARTMENT OF THE TREASURY, *May 25, 1978.*

The appended notices relating to investigations by the United States International Trade Commission are published for the information of Customs Officers and others concerned.

R. E. CHASEN,
Commissioner of Customs.

In The Matter of CERTAIN APPARATUS FOR THE CONTINUOUS PRODUCTION OF COPPER ROD	Investigation No. 337-TA-52

Notice of Investigation

Notice is hereby given that on April 11, 1978, Southwire Company (complainant), 126 Fertilla Street, Carrollton, Georgia 30117, filed a complaint with the United States International Trade Commission under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). The complaint alleges unfair methods of competition and unfair acts in the unauthorized importation of certain apparatus for the continuous production of copper rod, including in-line rolling mill and pickling system (the production apparatus), and components thereof, and replacement parts therefor, or in their sale, by reason of the alleged coverage of the production apparatus or components thereof, or replacement parts therefor by all the claims of U.S. Letters Patent 3,881,337 and 3,766,763 (the '763 patent) (collectively, the apparatus patents).

1. That, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine, under subsection (c) whether, on the basis of the allegations set forth in the complaint and the evidence adduced, there is a

violation or reason to believe that there is a violation of subsection (a) of this section in the unauthorized importation of certain apparatus, used for the continuous production of copper rod (the production apparatus), or components thereof or replacement parts therefor, into the United States, or in their subsequent sale, by reason of: (1) the alleged coverage of the production apparatus or components thereof, or replacement parts therefor by all the claims of the U.S. Letters Patent 3,881,337 and 3,766,763 (the '763 patent); (2) the contribution of the imported production apparatus or components thereof, or replacement parts therefor to the infringement of U.S. Letters Patent 3,317,994, 3,623,532, 3,672,430, 3,806,366, and claim 6 of the '763 patent, and U.S. Letters Patent 3,716,423; and (3) the incorporation in the manufacture, installation and operation of the production apparatus, or components thereof, or replacement parts therefor of certain misappropriated proprietary information of complainant, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.

2. That, for the purpose of this investigation so instituted, the following are hereby named as parties:

a. The complainant is

Southwire Company
126 Fertilla Street
Carrollton, Georgia 30117

The complaint further alleges unfair methods of competition and unfair acts in the unauthorized importation of the production apparatus, and components thereof, and replacement parts therefor, or in their sale, by reason of the contribution of the imported production apparatus or components thereof, or replacement parts therefor to the infringement of U.S. Letters Patent 3,317,994, 3,623,532, 3,672,430, 3,806,366, and claim 6 of the '763 patent (collectively, the method patents), and U.S. Letters Patent 3,716,423 (the product patent). In addition, the complaint alleges unfair methods of competition and unfair acts in the unauthorized importation of the production apparatus, or components thereof, or replacement parts therefor or in their sale, by reason of the incorporation in the manufacture, installation and operation of the production apparatus of certain misappropriated proprietary information of complainant. The complaint alleges that such unfair methods of competition have the effect or tendency to destroy or substantially injure an industry efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States.

Complainant requests a permanent exclusion order against production apparatus or components thereof, or replacement parts therefor which infringe any of the claims of the apparatus patents or contribute to the infringement of any of the claims of the method patents or the product patent. Complainant also requests exclusion from entry into the United States, except under bond, of the production apparatus or components thereof, or replacement parts therefor, during the investigation of this matter (a temporary exclusion order).

Having considered the complaint, the United States International Trade Commission on May 15, 1978, ORDERED:

b. The respondents are the following companies alleged to be involved in the unauthorized importation of such articles into the United States, or in their sale, and are parties upon which the complaint and this notice are to be served.

(1) American Telephone & Telegraph Co.
195 Broadway
New York, New York 10007

(2) Western Electric Company, Inc.
195 Broadway
New York, New York 10007

(3) Nassau Recycle Corporation
Dutch Center, Suite 350
810 Dutch Square Boulevard
Columbia, South Carolina 29210

(4) Fried Krupp G.m.b.H.
Krupp Industrie-und Stahlbau
Duisburg 14
Federal Republic of Germany

(5) Krupp A. G.
Essen
Federal Republic of Germany

(6) Krupp International, Inc.
550 Mamaroneck Ave.
Harrison, N.Y. 10528

c. Edward M. Lebow, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation.

3. That, for the purpose of the investigation so instituted, Judge Donald K. Duvall, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby appointed as presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's *Rules of Practice and Procedure*, as amended (19 C.F.R. 210.21). Pursuant to section 210.21(a) of the Rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint, as computed pursuant to sections 210.14 and 201.16

of the Rules. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and of this notice, and will authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination, respectively, containing such findings.

The complaint, with the exception of business confidential information, is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, and in the New York City Office of the Commission, 6 World Trade Center.

By order of the Commission:

KENNETH R. MASON
Secretary

Issued: May 17, 1978

[TA–406–2, TA–406–3, and TA–406–4]

CLOTHES FROM THE PEOPLE'S REPUBLIC OF CHINA, THE POLISH PEOPLE'S REPUBLIC, AND THE SOCIALIST REPUBLIC OF ROMANIA

Notice of Investigations and Hearing

Investigations instituted. Following receipt of a petition on May 3, 1978, field by the Clothespin and Veneer Products Association (CVPA), the U.S. International Trade Commission on May 56, 5978, instituted investigations under section 406(a) of the Trade Act of 1974 to determine, with respect to imports of clothespins provided for in items 790.05, 790.07, and 790.08 of the Tariff Schedules of the United States, which are the products of the People's Republic of China, the Polish People's Republic, and the Socialist Republic of Romania, whether market disruption exists with respect to such articles produced by a domestic industry. Section 406(e)(2) of the Trade Act defines market disruption to exist within a domestic industry if "imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.

Public hearing. A public hearing in connection with these investigations will be held in Portland, Maine, at 9:30 a.m., e.d.t., on Thursday, June 26, 1978. The location of the hearing will be announced later. Requests for appearances at the hearing should be received in writing by the Secretary of the Commission at his office in Washington, D.C., not later than noon, Thursday, June 15, 1978.

Inspection of petition. The petition filed in this case is available for public inspection at the Office of the Secretary, U.S. International Trade Commission and at the New York City office of the Commission located at 6 World Trade Center.

By order of the Commission:

KENNETH R. MASON
Secretary

Issued: May 16, 1978

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